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12 Attorneys for Plaintiff
13 SUCCESSFACTORS, INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION

17
18 SUCCESSFACTORS, INC. a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
22 corporation; and DOES 1-10,

23 Defendants.

Case No. C-08-1376 CW (BZ)

**DECLARATION OF HENRY Z. CARBAJAL III IN
SUPPORT OF PLAINTIFF SUCCESSFACTORS,
INC.'S MOTION TO COMPEL PRODUCTION OF
DOCUMENTS, FURTHER INTERROGATORY
ANSWERS AND PROPER PRIVILEGE LOGS**

Date: September 3, 2008
Time: 10:00 a.m.
Judge: Hon. Bernard Zimmerman
Place: Courtroom G, 15th Floor

Date of Filing: July 30, 2008
Trial Date: May 11, 2009

1 I, Henry Z. Carbajal III, declare as follows:

2 1. I am an attorney with the law firm of Fenwick & West LLP, counsel to Plaintiff
3 SuccessFactors, Inc. ("SuccessFactors") and I make this declaration in support of Plaintiff
4 SuccessFactors, Inc.'s Motion to Compel Production of Documents, Further Interrogatory
5 Answers and Proper Privilege Logs. I make the following statements based upon my personal
6 knowledge, and, if called upon to testify, would testify competently to them.

7 2. Discovery in the present action opened on March 27, 2008, the day Judge Wilken
8 presided over the hearing on SuccessFactors' motion for a preliminary injunction. During that
9 hearing, Defendant Softscape, Inc.'s ("Softscape") counsel, Jessica Grant, represented that
10 discovery would be forthcoming on the pressing issue of whether and how the libelous "The
11 Naked Truth" Presentation emanated from Softscape.

12 3. Despite overtures from Softscape's counsel, discovery was not forthcoming. I am
13 informed that Softscape produced no documents in April 2008, 867 documents in May 2008 and
14 8 documents in June 2008. Notably, during hearings before the Court at a May 8 discovery
15 conference, a June 11, 2008 letter to Magistrate Judge Zimmerman, the June 17, 2008 Case
16 Management Conference and, most recently, the July 3, 2008 discovery conference, Softscape's
17 counsel made similar representations that its document production was forthcoming. It also bears
18 noting that of the small number of documents produced, many were not produced in their native
19 format as the parties previously agreed, thus omitting crucial metadata.

20 4. After the July 3, 2008 discovery conference, on July 7, 2008 the Court issued its
21 Third Discovery Order stating that "[a]ll document production must be completed by August 1,
22 2008, except production of documents designated by the plaintiff as tier 1 for the six specified
23 individuals, which must be completed by July 15, 2008."

24 5. Beginning on July 15, 2008 and continuing for more than a week after, Softscape
25 issued a few miniscule productions ranging from approximately 150 to 250 documents, with
26 many not produced in their native format. At the present time, Softscape has apparently not
27 completed the production ordered by the Court for July 15.

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1 6. On March 28, 2008, the day after the preliminary injunction hearing,
2 SuccessFactors served its First Set of Requests for the Production of Documents (Nos. 1-16).
3 Softscape served initial responses to SuccessFactors' first set of requests on May 1, 2008.
4 Counsel for both parties met and conferred in person on May 9, 2008 regarding Softscape's
5 responses. Softscape thereafter served amended responses to the first set of document requests on
6 May 14, 2008.

7 7. On April 4, 2008, SuccessFactors served its Second Set of Requests for the
8 Production of Documents (Nos. 17-43). Softscape served initial responses to the second set of
9 requests on May 4, 2008. Counsel for both parties met and conferred in person on May 15, 2008
10 on the second set of requests, and on additional disputes from SuccessFactors' first set of
11 document requests. On May 19, 2008, Softscape served amended responses to the second set of
12 requests. An additional meet and confer session took place on May 27, 2008 regarding
13 SuccessFactors' second set of document requests. Another in-person meet and confer session
14 took place on June 4, 2008 on some of the subjects of the document requests, for example
15 production of versions of the Presentation under SuccessFactors' Document Request No. 1.

16 8. On April 11, 2008, SuccessFactors served its First Set of Interrogatories (Nos. 1-
17 19). Softscape served its responses to the first set of interrogatories on May 12, 2008. Softscape
18 subsequently served amended responses to the interrogatories on May 23, 2008.

19 9. After a round of letter briefs in June 2008 largely regarding document production,
20 the Court held its discovery conference, and issued its July 7, 2008 Order, requiring the parties'
21 lead trial counsel to meet and confer on all then-pending discovery disputes by July 11, 2008. For
22 disputes remaining unresolved, except as to scope and timing of document production, the parties
23 were given leave to file motions to compel.

24 10. I, along with my colleague Laurence Pulgram, attended an in-person meet and
25 confer session as counsel for SuccessFactors at Fenwick & West LLP's offices in San Francisco.
26 Robert Taylor, in person, and Jeffrey Ratinoff, via telephone, attended as counsel for Softscape.
27 The parties met and conferred for approximately three hours, but were unable to discuss all
28 pending disputed issues falling within the scope of the Court's July 7, 2008 Order. Thus, the

1 parties subsequently agreed to meet and confer in person on residual disputed issues on July 17,
2 2008 at Softscape's counsel's offices in Palo Alto. I also attended this meet and confer session
3 for multiple hours with my colleague Laurence Pulgram, as counsel for SuccessFactors. Robert
4 Taylor and Jeffrey Ratinoff attended on behalf of Softscape. Despite these substantial meet and
5 confer efforts, the parties were unable to resolve all disputes, prompting the instant motion.

6 **Issues Discussed During the July 10, 2008 Meet and Confer Session**

7 11. At the July 10, 2008 meet and confer session, the parties discussed the following
8 issues included in the instant motion: SuccessFactors raised Softscape's response to Interrogatory
9 No. 7 regarding access to SuccessFactors' proprietary sales demo accounts. Softscape had
10 restricted its response to pertain only to SuccessFactors' ACE 275 sales demo and creation of the
11 Presentation. Softscape's counsel refused to lift this limitation, but requested until July 15, 2008
12 to confer with its client. Softscape ultimately notified SuccessFactors by letter dated July 15,
13 2008 that it would retain its response as written.

14 12. SuccessFactors raised Softscape's response to Document Request No. 2 regarding
15 database information on potential or intended recipients of the Presentation, sales and marketing
16 efforts directed at Presentation recipients, internal communications regarding Presentation
17 recipients, and communications about the Presentation. Softscape's counsel refused to produce
18 this information. Softscape has flatly refused to produce the requested documents regarding
19 potential or intended recipients of the Presentation. Softscape refused to do an across the board
20 search of its customer databases, or even a search of databases other than its primary customer
21 database, instead promising only to produce some sort of cross reference list of "hits" between the
22 John Anonymous e-mail list and its primary customer database. (Softscape has not yet delivered
23 this "hit" list.) Softscape also refused to produce documents regarding sales and marketing
24 efforts directed at Presentation recipients unless SuccessFactors first identified recipients with
25 which it had a prospective economic relationship with which it claimed had been interfered.
26 Softscape further refused to produce internal communications regarding Presentation recipients.
27 Softscape's counsel requested until July 15, 2008 to confer with its client as to its final position.

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1 Softscape ultimately notified SuccessFactors by letter dated July 15, 2008 that it would indeed
2 retain its response as written.

3 13. SuccessFactors raised Softscape's response to Document Request Nos. 4 and 5
4 regarding the production of press releases and related documents under those document requests.
5 SuccessFactors asked whether Softscape would produce communications regarding its press
6 releases, and particularly those regarding its press release documents concerning the Presentation.
7 Softscape refused to produce this information under Document Request Nos. 4 and 5.
8 SuccessFactors specifically asked whether Softscape intended to produce e-mails Softscape sent
9 to customers regarding press releases regarding the Presentation. Softscape's counsel advised
10 that it intended to withhold such e-mails it had sent to customers, for example, March 14, 2008 e-
11 mails sent by Mr. Watkins and Mr. Vatcher to unidentified customers, and would not agree that
12 these fell within the scope of documents that Softscape had agreed to produce.

13 14. SuccessFactors raised Softscape's response to Document Request No. 6 regarding
14 communications between Softscape and specific SuccessFactors customers and communications
15 between Softscape and SuccessFactors' current or former employees. Softscape claimed it had
16 initially interpreted the request as calling for improbable three-way communications between (i)
17 Softscape, (ii) specific customers and (iii) SuccessFactors' current/former employees, but
18 dropped this objection during the parties' conference. However, Softscape refused to drop its
19 artificial limitation of the request to communications relating only to the Presentation.

20 15. SuccessFactors raised Softscape's response to Document Request No. 7 regarding
21 documents created or modified after February 2007 concerning SuccessFactors. Softscape had
22 originally asserted a time restriction of January 1, 2008 to the present for the documents
23 requested, but subsequently agreed to produce documents dating back to February 1, 2007.
24 However, Softscape refused to drop its artificial limitation of the request to documents relating
25 only to the Presentation. Softscape's counsel requested until July 15, 2008 to confer with its
26 client as to its final position. Softscape ultimately notified SuccessFactors by letter dated July 15,
27 2008 that it would retain its limitation as written.

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1 16. SuccessFactors raised Softscape's response to Document Request No. 8 regarding
2 documents concerning or showing Softscape's computers' access to SuccessFactors' online
3 resources. Softscape had originally asserted a time restriction of January 1, 2008 to the present
4 for the documents requested, but subsequently agreed to produce documents dating back to
5 February 1, 2007. However, Softscape refused to drop its artificial limitations regarding the
6 February 1, 2007 date as well as its limitation of the request to documents relating only to the
7 Presentation. Softscape's counsel requested until July 15, 2008 to confer with its client as to its
8 final position. Softscape ultimately notified SuccessFactors by letter dated July 15, 2008 that it
9 would retain its limitations as written.

10 17. SuccessFactors raised Softscape's response to Document Request No. 15
11 regarding documents concerning Softscape's procurement and use of SuccessFactors' trademarks
12 or PowerPoint templates. Softscape attempted to limit the request to procurement and use of
13 SuccessFactors' trademarks and templates in creating the Presentation, and did not agree to lift
14 this restriction.

15 18. SuccessFactors raised Softscape's response to Document Request No. 28
16 regarding documents concerning recipients of documents or information provided by
17 SuccessFactors to New Millennium Shoe ("NMS"). Softscape refused to produce documents
18 concerning recipients of *information* and refused to remove its limitations of the request to
19 documents relating to the proposal obtained from Jorge Corrales of SuccessFactors and the
20 Presentation. Softscape's counsel requested until July 15, 2008 to confer with its client as to its
21 final position. Softscape ultimately notified SuccessFactors by letter dated July 15, 2008 that it
22 would retain its limitations as written.

23 19. SuccessFactors raised Softscape's response to Document Request No. 29
24 regarding documents concerning commentary, discussion or analysis of any documents or
25 information provided by SuccessFactors to NMS. Softscape refused to remove its limitations of
26 the request to documents relating to the proposal obtained from Jorge Corrales of SuccessFactors
27 and the Presentation. Softscape's counsel requested until July 15, 2008 to confer with its client as

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1 to its final position. Softscape ultimately notified SuccessFactors by letter dated July 15, 2008
2 that it would retain its limitations as written.

3 20. SuccessFactors raised Softscape's response to Document Request No. 42
4 regarding communications between Ely Valls' hotmail account and Softscape CEO Dave Watkins
5 or Softscape from January 1, 2007 to the present. Softscape had interposed limitations on the
6 request to communications from February 1, 2007 to the present, and also limited the request to
7 the Presentation and SuccessFactors' ACE 275 sales demo. As Ely Valls is Dave Watkins' sister-
8 in-law, SuccessFactors proposed a compromise to exclude communications of a purely personal
9 nature. Softscape refused this offer and retained its other limitations. Notwithstanding this
10 impasse, the parties discussed this request again on July 17, 2008.

11 **Issues Discussed During the July 17, 2008 Meet and Confer Session**

12 21. At the July 17, 2008 meet and confer session, the parties discussed the following
13 issues included in the instant motion: SuccessFactors raised Softscape's response to Document
14 Request No. 1 regarding documents concerning the genesis, creation, review, or revision of the
15 Presentation. SuccessFactors particularly raised the issues of production of log file information,
16 file location information and metadata regarding versions of the Presentation, which had not
17 previously been produced. Softscape's counsel requested until July 21, 2008 to confer with its
18 client as to its final position. Softscape requested more information from SuccessFactors as to
19 what SuccessFactors wanted by an e-mail dated July 21, 2008. SuccessFactors responded by e-
20 mail on July 22, 2008, further explaining its request with respect to log files and metadata, and
21 identifying specific types of such information that should be available for production from
22 Softscape's server or other locations. Softscape replied by e-mail on July 25, 2008 vaguely
23 indicating that some of the information specified by SuccessFactors did not exist, and not denying
24 the existence of other file records, but asserting other file directory information created during the
25 collection of documents for this litigation was work-product and indicating the balance would
26 simply not be produced pursuant to boilerplate objections. At bottom, Softscape did not agree to
27 produce any log file, server records, system records or metadata requested as responsive to
28 Document Request No. 1.

22. SuccessFactors raised Softscape's response to Document Request No. 17 regarding documents concerning actual or planned Softscape press releases regarding this action. The parties discussed a compromise to alleviate Softscape's concerns regarding overbreadth. Under the compromise, the request would be construed to remove the phrase "but not limited to" from the requests. SuccessFactors also agreed to forego the request's call for "file histories." Softscape's counsel requested until July 22, 2008 to confirm its agreement to the compromise. On July 22, 2008, Softscape notified SuccessFactors via email that it agreed to most of the compromise, but inexplicably refused to produce any responsive documents dated after the preliminary injunction hearing. Additionally, the parties agreed on July 10, 2008 that Softscape would log alleged privileged and work product communications with in-house counsel regarding its investigation concerning John Anonymous through March 27, 2008. Given their probative nature and likely disagreement over privileged status, SuccessFactors requested that Softscape log documents withheld concerning its actual or planned press releases, under Document Request No. 17, through March 27, 2008. Softscape did not agree to log withheld documents for this request.

23. SuccessFactors raised Softscape's response to Document Request Nos. 22-25 regarding communications from January 1, 2008 to the present, between select employees, Dennis Martinek, Rick Vatcher, Dave Watkins and Susan Mohr, respectively, and actual and prospective customers of Softscape. Softscape had previously asserted and maintained its imposed limitations on the request to communications relating only to the Presentation. Moreover, Softscape stated it would only produce communications as to 15 specific entities, which were identified by SuccessFactors in an interrogatory response related to SuccessFactors' claim of interference with prospective economic advantage. SuccessFactors proposed to narrow these requests to include communications regarding SuccessFactors, the Presentation, its contents, this litigation, and Presentation recipients, including those on the John Anonymous address list. Softscape refused this proposal.

24. SuccessFactors raised Softscape's response to Document Request No. 32 regarding deals made and related communications between Softscape and actual or prospective customers after January 1, 2008. Softscape initially declined to produce any documents

1 responsive to this request. During the meet and confer session, SuccessFactors offered to further
2 limit the time duration of the request to February 19, 2008 (the time when Softscape most
3 recently gained access to the password protected demo environment) to the present, in order to
4 alleviate Softscape's concerns regarding burden and overbreadth. Softscape refused this
5 compromise, and indicated that it would only agree to produce documents limited to 15 entities
6 that SuccessFactors identified in an interrogatory response related to SuccessFactors' claim of
7 interference with prospective economic advantage, and production would also be subject to a time
8 limitation from March 4 to the present.

9 25. Although the parties did not specifically discuss Softscape's response to Document
10 Request No. 13 on July 17, 2008 due to time constraints, the request and limitations imposed by
11 Softscape are similar to Document Request No. 32. Request No. 13 pertains to documents
12 concerning deals made and the negotiating history between Softscape and Presentation recipients
13 or entities mentioned in the Presentation. Softscape had previously indicated in a June 24, 2008
14 letter it saw no reason to produce responsive documents dated prior to March 4, 2008. It also
15 indicated it was construing the request as dependent on SuccessFactors' identification of specific
16 lost sales. These mirror Softscape's artificial limitations to Document Request No. 32, which
17 Softscape maintained. Thus, Softscape's refusal to comply with Document Request No. 32 is
18 also a refusal to comply with Document Request No. 13.

19 26. SuccessFactors again raised Softscape's response to Document Request No. 42
20 regarding communications between Ely Valls' hotmail account and Softscape CEO Dave Watkins
21 or Softscape from January 1, 2007 to the present. Again, SuccessFactors offered to eliminate
22 communications of a purely personal nature from the production. Softscape refused this offer.
23 However, SuccessFactors also discussed a possible compromise where Softscape would produce
24 communications between Ely Valls' hotmail account and Softscape or Dave Watkins, limited to
25 those relating in any way to Softscape's business, including any competition or competitors of
26 Softscape, or the NMS website. Softscape requested until July 22, 2008 to confer with its client
27 as to its final position. Softscape notified SuccessFactors via e-mail dated July 22, 2008 that it
28 would only agree to produce Ely Valls' e-mails relating to facts contained or statements made in

1 the Presentation, access to SuccessFactors' ACE 275 sales demo, and SuccessFactors. Thus,
2 Softscape has refused to comply with Document Request No. 42.

3 27. SuccessFactors raised the issue of information improperly withheld from
4 Softscape's produced mobile and corporate phone records. Pursuant to Softscape's Third Set of
5 Document Requests, including Document Request Nos. 44-48, and subsequent meet and confer
6 efforts, Softscape has produced limited mobile phone records for nine specific employees, as well
7 as corporate phone records, showing calls between the dates of March 4 and March 5, 2008.
8 Softscape produced these limited records on June 20, 2008 (mobile phone records), July 17, 2008
9 (corporate phone records) and July 25, 2008 (mobile phone records), respectively. Each
10 production of records has had call information heavily redacted, either entirely (based on
11 relevance grounds) or partially to remove the telephone number of any non-Softscape employee.
12 The productions of June 20 included a privilege log noting reasons for the redaction of certain
13 telephone numbers. Softscape provided an updated log to SuccessFactors during the July 17,
14 2008 meet and confer session. The corporate phone records produced on July 17, 2008 list
15 independent reasons for redaction. Softscape cited only three reasons for redaction within its
16 privilege logs: Right to Privacy, Confidential Human Resources Information and Trade
17 Secret/Confidential and Proprietary Business Information (or an equivalent confidentiality
18 assertion as to customer or marketing information). During the meet and confer session, to
19 balance privacy concerns, SuccessFactors proposed that it forego the identification of any
20 employee's family members' calls, with the exception of the Watkins family. SuccessFactors
21 further proposed that Softscape omit the phone *numbers* of any non-employee party within its
22 produced records but supply only the names of companies and their representatives or "friends"
23 that communicated with the selected Softscape employees where applicable. Softscape requested
24 until July 22, 2008 to confer with its client as to its final position. Softscape notified
25 SuccessFactors via e-mail dated July 22, 2008 that it refused to identify the names of employees'
26 "friends" in the phone records, and pledged to obtain a final answer on identification of company
27 and representative names by the next morning. At the time of this declaration, Softscape has not
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1 given its final position on identifying the names of companies and their representatives for
2 applicable phone calls.

3 28. During the course of these contentious discovery proceedings, SuccessFactors has
4 obtained information that Softscape CEO Dave Watkins, before falsely posing as NMS to access
5 SuccessFactors' website, had also previously broken into SuccessFactors' web environment on
6 another occasion in 2005.

7 29. Attached hereto as **Exhibit 1** is a true and correct copy of the Declaration of David
8 Watkins in Opposition to Plaintiff's Motion to Strike, dated March 26, 2008.

9 30. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts from the
10 deposition transcript of David Watkins, dated May 30, 2008.

11 31. Attached hereto as **Exhibit 3** is a true and correct copy of excerpts from the
12 deposition transcript of David Watkins, dated May 29, 2008.

13 32. Attached hereto as **Exhibit 4** is a true and correct copy of Plaintiff's First Set of
14 Requests for Production of Documents and Things, dated March 28, 2008.

15 33. Attached hereto as **Exhibit 5** is a true and correct copy of Defendant's Response to
16 Plaintiff's First Set of Requests for Production of Documents and Things, dated May 1, 2008.

17 34. Attached hereto as **Exhibit 6** is a true and correct copy Defendant's Amended
18 Responses and Objections to Plaintiff's Set of Requests for Production of Documents and Things,
19 dated May 14, 2008.

20 35. Attached hereto as **Exhibit 7** is a true and correct copy Plaintiff's Second Set of
21 Requests for Production of Documents and Things, dated April 4, 2008.

22 36. Attached hereto as **Exhibit 8** is a true and correct copy Defendant's Response to
23 Plaintiff's Second Set of Requests for Production of Documents and Things, dated May 5, 2008.

24 37. Attached hereto as **Exhibit 9** is a true and correct copy Defendant's Amended
25 Responses to Plaintiff's Second Set of Requests for Production of Documents and Things, dated
26 May 19, 2008.

27 38. Attached hereto as **Exhibit 10** is a true and correct copy of Plaintiff's First Set of
28 Interrogatories, dated April 11, 2008.

1 39. Attached hereto as **Exhibit 11** is a true and correct copy Defendant's Responses
2 and Objections to Plaintiff's First Set of Interrogatories, dated May 12, 2008.

3 40. Attached hereto as **Exhibit 12** is a true and correct copy Defendant's Amended
4 Responses and Objections to Plaintiff's First Set of Interrogatories, dated May 23, 2008.

5 41. Attached hereto as **Exhibit 13** is a true and correct copy of a hearing transcript of
6 proceedings before the Honorable Judge Wilken, dated March 27, 2008 (Docket Number 71).

7 42. Attached hereto as **Exhibit 14** is a true and correct copy a hearing transcript of the
8 proceedings before the Honorable Judge Wilken, dated June 17, 2008 (Docket Number 164).

9 43. Attached hereto as **Exhibit 15** is a true and correct copy of a Softscape production
10 document numbered SSP002583.

11 44. Attached hereto as **Exhibit 16** is a true and correct copy of a Softscape production
12 document numbered SSP002439.

13 45. Attached hereto as **Exhibit 17** is a true and correct copy of a Softscape production
14 document numbered SSP012453.

15 46. Attached hereto as **Exhibit 18** is a true and correct copy of a Softscape production
16 document numbered SSP009047.

17 47. Attached hereto as **Exhibit 19** is a true and correct copy of an email string between
18 Jeffrey Ratinoff and myself, dated July 25, 2008, with an embedded email from myself to Bryan
19 Sinclair dated July 22, 2008.

20 48. Attached hereto as **Exhibit 20** is a true and correct copy of a letter from Ben
21 Wagner to Liwen Mah, dated June 24, 2008.

22 49. Attached hereto as **Exhibit 21** is a true and correct copy of a letter from Jeffrey
23 Ratinoff to Henry Carbajal, dated June 20, 2008.

24 50. Attached hereto as **Exhibit 22** is a true and correct copy of an email string between
25 Bryan Sinclair and Henry Carbajal, dated July 22, 2008.

26 51. Attached hereto as **Exhibit 23** is a true and correct copy of a Softscape press
27 release, dated March 31, 2008.

28 ///

52. Attached hereto as **Exhibit 24** is a true and correct copy of a letter from Liwen Mah to Jeffrey Ratinoff, dated June 14, 2008.

53. Attached hereto as **Exhibit 25** is a true and correct copy of a letter from Jeffrey Ratinoff to Liwen Mah, dated July 9, 2008.

54. Attached hereto as **Exhibit 26** is a true and correct copy of Softscape press release, dated March 14, 2008.

55. Attached hereto as **Exhibit 27** is a true and correct copy of a Softscape Privilege Log, dated July 17, 2008.

56. Attached hereto as **Exhibit 28** is a true and correct copy of a Softscape production document numbered SSHC00654.

57. Attached hereto as **Exhibit 29** is a true and correct copy of a letter from Jeffrey Ratinoff to Patrick Premo, dated June 20, 2008.

58. Attached hereto as **Exhibit 30** is a true and correct copy of a letter from Jeffrey Ratinoff to Henry Carbajal, dated July 25, 2008.

59. Attached hereto as **Exhibit 31** is a true and correct copy of a letter from Patrick Premo to Bryan Sinclair, dated June 27, 2008.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 30th of July 2008 at Mountain View, California.

/s/ Henry Z. Carbajal III
Henry Z. Carbajal III

EXHIBIT 1

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12 Attorneys for Plaintiff
13 SUCCESSFACTORS, INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10, inclusive,

22 Defendants.
23
24

Case No. CV 08-1376 CW

MANUAL FILING NOTICE

Date: September 3, 2008
Time: 10:00 a.m.
Courtroom: G, 15th Floor
Judge: Hon. Bernard Zimmerman
Date of Filing: July 30, 2008
Trial Date: May 11, 2009

25 **RE: CONFIDENTIAL EXHIBITS 1, 2, 3, 11, 12, 15, 16, 17, 18, 19, 21, 22, 28, . TO**
26 **THE DECLARATION OF HENRY Z. CARBAJAL IN SUPPORT OF MOTION TO**
27 **COMPEL PRODUCTION OF DOCUMENTS, FURTHER INTERROGATORY**
28 **ANSWERS AND PROPER PRIVILEGE LOGS**

This filing is in paper or physical form only, and is being maintained in the case file in the Clerk's office.

If you are a participant on this case, this filing will be served in hard-copy shortly.

For information on retrieving this filing directly from the court, please see the court's main web site at <http://www.cand.uscourts.gov> under Frequently Asked Questions (FAQ).

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☒ Item Under Seal

☐ Conformance with the Judicial Conference Privacy Policy (General Order 53).

☐ Other (description): _____

Dated: July 30, 2008

FENWICK & WEST LLP

By: /s/ Patrick Premo
Patrick Premo

Attorneys for Plaintiff
SUCCESSFACTORS, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

-----x

SUCCESSFACTORS, INC., a Delaware
corporation,

Plaintiff,

Case No.

vs.

CV 08 1376 CW (BZ)

SOFTSCAPE, INC., a Delaware
corporation; DOES 1-10, inclusive,
Defendants.

Vol. II

-----x

VIDEOTAPED DEPOSITION OF DAVID V. WATKINS, a
witness called by and on behalf of the Plaintiff,
taken pursuant to Rule 30 of the Federal Rules of
Civil Procedure, before James A. Scally, RMR, CRR, a
Notary Public in and for the Commonwealth of
Massachusetts, at the offices of Bromberg & Sunstein
LLP, 125 Summer Street, Boston, Massachusetts, on
Friday, May 30, 2008, commencing at 9:16 a.m.

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Q.

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Figure 1

● **●**

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U.S. LEGAL SUPPORT

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[REDACTED]

[REDACTED]

[REDACTED]

16

Q. Can you be more specific, please?

17

A. No.

18

Q.

2

25

MR. DAVIDS: Objection.

1

A.

¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Q.

[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

6

[REDACTED]

7

[REDACTED]

[REDACTED]

8

[REDACTED]

[REDACTED]

9

[REDACTED]

10

Q. What organization?

11

A. Softscape.

12

Q. And when he attended this dinner, was it in New

13

York?

14

A. I believe so, correct.

15

Q. Was it called a people connect dinner?

16

A. I don't remember.

17

Q. What do you understand happened at that dinner?

18

A. I don't, actually.

19

Q. What do you know about Larry Kurzner's attendance

20

of it?

21

A. That he went to it.

22

Q. Was this for prospective customers?

23

A. I don't know why Larry was there.

24

Q. How did he manage to get into the people connect

25

dinner for SuccessFactors?

1 A. He was part of Accenture.

2 Q. Accenture?

3 A. At the time.

4 Q. He was part of Accenture at the time, and he is
5 now?

6 A. He's part of Softscape.

7 Q. When was he hired?

8 MR. DAVIDS: Objection.

9 A. Don't recall a specific date.

10 Q. Was it in March of 2008?

11 A. I don't remember.

12 Q. Was he -- well, it was after he attended the
13 people connect event, correct?

14 A. I don't recall when that event was, and I don't
15 remember when he was hired, so I don't know.

16 MR. DAVIDS: Did you give us the date
17 of that dinner?

18 MR. PULGRAM: I did not give you the
19 date of that dinner.

20 Q. But I wanted to know from you whether Mr. Kurzner
21 went before or after he was employed by Softscape.

22 A. I don't know.

23 Q. He could have gone while he was a Softscape
24 employee pretending to still be at Accenture?

25 MR. DAVIDS: Objection.

1 A. I don't have the dates.

2 Q. I understand you don't have the dates.

3 A. So I can't respond.

4 Q. It's possible that that happened; you can't --

5 MR. DAVIDS: Objection.

6 Q. -- deny that that's a possibility?

7 MR. DAVIDS: Objection.

8 A. I don't have the dates.

9 Q. Did you communicate with Larry Kurzner about that
10 dinner before he attended it?

11 A. I don't remember.

12 Q. Did you communicate with anybody in your team
13 about his attendance at that dinner?

14 A. I don't recall.

15 Q. Prior to that dinner, was Larry Kurzner in
16 negotiations or discussions with Softscape to become an
17 employee?

18 MR. DAVIDS: Objection.

19 A. I don't remember.

20 Q. What was his job at Accenture?

21 A. Actually, I don't know the official role that he
22 had at Accenture.

23 Q. What is your best understanding, sir?

24 A. At one point he negotiated our contract with
25 Accenture.

1 Q. So he was a purchaser of software at least in
2 part?

3 A. I don't know.

4 Q. Was he in charge of implementation there?

5 A. I don't know.

6 Q. What is his role now at Softscape? Tell me again.

7 **1** [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 MR. DAVIDS: Wait a second. Before

1 he answers these questions, can you tell me
2 where in the deposition notice what their
3 strategic planning for the future in terms
4 of territories has to do with any of your
5 categories?

6 MR. PULGRAM: It has to do with
7 dissemination of the presentation.

8 1 [REDACTED]

10 MR. DAVIDS: Are you talking about
11 now?

12 2 [REDACTED]

14 MR. DAVIDS: I'm going to object to
15 that. I'm not going to let him answer
16 that. I'll take that up with the judge.
17 If you want to know what Softscape's
18 strategy is out in the field about what
19 areas they deem to be important or not,
20 that has absolutely nothing to do with this
21 notice.

22 3 [REDACTED]

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1 [REDACTED]

MR. DAVIDS: I'll object. I'll let
you answer that one question to move on.

2 [REDACTED]
[REDACTED]
[REDACTED]

MR. DAVIDS: Objection.

3 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

MR. DAVIDS: I'll object. I'll let
you answer that one question, and then
that's it on this topic, if you can answer
that.

A. 4 [REDACTED]
[REDACTED]

Q. Did Mr. Kurzner provide the list of the attendees
at the dinner?

A. I don't recall specifically.

Q. What's your most -- your best recollection, sir?

5 [REDACTED]
[REDACTED]

1 A. I don't know.

2 Q. Did you get a copy of it?

3 A. I may have.

4 Q. Do you have a copy still?

5 A. I don't know.

6 Q. When you say you may have, are you uncertain about
7 that?

8 A. I get things from people all the time. It's quite
9 possible that I've gotten it.

10 Q. Are you uncertain about that?

11 A. It's quite possible. I actually don't know.

12 Q. What did you do with it?

13 A. I don't recall what I did with it.

14 Q. Who besides Mr. Kurzner at Softscape had the list?

15 MR. DAVIDS: Objection.

16 A. I don't know.

17 Q. How big was the list?

18 A. I don't recall.

19 Q. Did you have discussions internally about how to
20 use the list?

21 A. I don't remember.

22 Q. Did you have e-mails about how to use the list?

23 A. How to use the list?

24 Q. Yes.

25 A. I don't know.

1 Yes, if you'd take a break.

2 MR. DAVIDS: We'll call you back into
3 the room.

4 BY MR. PULGRAM:

5 Q. We've marked as Exhibit 21 the document production
6 by Google. You had it last night to look at, correct?

7 A. I did.

8 Q. ¹ [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 A. No.

12 Q. Well, there are so many, you couldn't get them all
13 in the first -- in the address line. If you look, the
14 first chunk is from page 1661 to 1664. Do you see that?

15 A. Correct. Do you mean the page numbers, the Bates
16 stamps?

17 Q. Yes.

18 A. Yes. Yep.

19 Q. ² [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 A. Correct.

23 ³ [REDACTED]

24 [REDACTED]

25 [REDACTED]

1

A.

1

2

3

4

A. That's the part starting on page 1725, do you mean?

5

6

Q. Well --

7

A. Sorry, 1724?

8

2

9

10

11

12

13

A. What page are you on?

14

Q. 1726.

15

A. Okay.

16

3

17

18

19

20

21

A. I have no idea.

22

MR. DAVIDS: Wait. Just so I'm

23

clear, are you talking about all the way to

24

the end of the list on 1727?

25

MR. PULGRAM: Well, obviously, there

1 information? A person?

2 MR. DAVIDS: Who could be.

3 A. Who could be, a person? Is that the question?

4 MR. DAVIDS: He'll ask again.

5 THE WITNESS: Sorry.

6 BY MR. PULGRAM:

7 1

9 Faust's responsibilities?

10 MR. DAVIDS: Objection.

11 2

12 3

16 MR. DAVIDS: Objection.

17 3

18 4

22 MR. DAVIDS: Objection.

23 4

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A.

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MR. DAVIDS: Objection.

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A.

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MR. DAVIDS: Objection.

25

A.

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1 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17

A. I don't recall a specific name.

18

Q. Anyone else?

19

2 [REDACTED]

[REDACTED]

[REDACTED]

22

MR. DAVIDS: Objection.

23

3 [REDACTED]

24

4 [REDACTED]

[REDACTED]

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

-----x

SUCCESSFACTORS, INC., a Delaware
corporation,

Plaintiff,

Case No.

vs.

CV 08 1376 CW (BZ)

SOFTSCAPE, INC., a Delaware
corporation; DOES 1-10, inclusive,
Defendants.

-----x

VIDEOTAPED DEPOSITION OF DAVID V. WATKINS, a
witness called by and on behalf of the Plaintiff,
taken pursuant to Rule 30 of the Federal Rules of
Civil Procedure, before James A. Scally, RMR, CRR, a
Notary Public in and for the Commonwealth of
Massachusetts, at the offices of Bromberg & Sunstein
LLP, 125 Summer Street, Boston, Massachusetts, on
Thursday, May 29, 2008, commencing at 9:16 a.m.

A. I had a PowerPoint presentation I would have printed to pdf.

Q. Okay. So this PowerPoint, where did it exist on the computers at Softscape?

A.

Q. Is it still there?

A. Yes.

Q. Is it still available in the format that you had at 8:12 p.m. on March 3rd?

A. To the best of my knowledge, I think we've hidden it so that it can't be referenced, but we've left it and preserved it.

Q. And does that --

A. But I don't recall if it was -- I mean I don't know if was exactly -- if it's exactly this version that's on that sales resource center, but I know that there is a version there, whatever was there at the time we were

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15

SuccessFactors employee.

17

Q. Can you spell her name, please?

18

A. I don't know specifically, but it's phonetic,

19

Swendowski.

20

Q. Is she still an employee --

21

A. To the best of my knowledge, that's her.

22

Q. Is she still an employee of Softscape?

23

A. No, she's not.

24

Q. How did she come to give a PowerPoint on that

25

template to Softscape?

1 A. To the best of my knowledge, I am -- I am actually
2 not sure if it's been produced, but I know it has been
3 produced. I don't know whether it's been distributed.

4 Q. Produced meaning given to your lawyers?

5 A. Correct.

6 Q. Distributed being given to us?

7 A. Correct. I do not know that specifically.

8 Q. Did you receive that presentation soon before
9 generating The Naked Truth document or at some
10 substantially earlier time?

11 A. To the best of my knowledge, it was earlier that I
12 would have -- would have received that.

13 Q. So you had it in your files?

14 A. Correct.

15 Q. Did you yourself take that template and load copy
16 on to it?

17 MR. DAVIDS: Objection.

18 A. I took -- what did I do with the template? Is
19 that what you're asking?

20 Q. Well, you had a presentation.

21 A. Right.

22 Q. And the presentation was on a template.

23 A. Right.

24 Q. And that was SuccessFactors' work.

25 A. Correct.

1 Q. -- in Exhibit 5.

2 A. Yes.

3 Q. Okay. What is that page, 6272001?

4 A. I don't know specifically how that relates, but I
5 believe it's probably -- it's probably a copy of the
6 information on their -- on their website.

7 Q. As of that date?

8 A. As of that date. Would have been the date that it
9 would have been captured.

10 Q. Did you collect that information?

11 A. To the best of my knowledge, yes. It could have
12 also come out of an e-mail; I don't recall specifically.

13 Q. Did you use this in your calculation of retention
14 numbers?

15 A. Yes, I did.

16 Q. For The Naked Truth presentation?

17 A. I used that for the retention numbers that are in
18 this Excel file spreadsheet, which is what I'm talking
19 about, which was also, parts of that were copied and pasted
20 in the PowerPoint.

21 Q. Okay. What is the tab referred to as original?
22 What does that mean? That's a multipage excerpt of this
23 spreadsheet within Exhibit 5 labeled "Original" at the
24 bottom.

25 MR. DAVIDS: Where is that located in

1 the package?

2 MR. PULGRAM: It's about 15 pages
3 from the end, roughly.

4 A. [REDACTED]

6 produced off of a public website.

7 Q. When was it gathered?

8 A. When was what gathered?

9 Q. This information.

10 A. Probably this year.

11 Q. By whom?

12 A. Actually, gathered -- from a gathering
13 perspective, I don't actually know when it was physically
14 gathered from their customers, but I know that when I
15 looked at it from their PowerPoint, from their webinar, as
16 well as their website, would have been this year. And it
17 would have been me. But I don't know actually the genesis
18 of how they gathered it, whomever authored this.

19 Q. You don't know who authored the original tab?

20 A. Actually, the person who presented this, portions
21 of it at least, were Robert, because that was who had the

22 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 Q. What I'm trying to understand specifically --

2 A. Uh-huh.

3 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

7 Q. And the other is one particular webinar; is that
8 correct?

9 A. Correct.

10 Q. Okay. And what was the date of that webinar?

11 A. I don't know specifically.

12 Q. Was it in 2004?

13 A. I don't know.

14 Q. This --

15 A. I'm assuming that it was probably 2004, because

16 [REDACTED]

17 Q. Can you explain to me -- okay. Who collected the
18 names from that webinar?

19 A. I did.

20 Q. Did you attend the webinar?

21 A. This was an online recorded webinar that you can
22 get in the public domain. It's just watching it. So it's
23 not -- it wasn't a live one. It's just out there on the
24 Internet.

25 Q. Right. And did you have to log in to watch it?

1 A. No.

2 Q. Did you have to give any name or information?

3 A. Nope.

4 Q. The -- so you watched it, and then did you make
5 this list or did you assign someone else to make this list?
6 Did you make a screen shot? How did you make the list?

7 A. This list, I made the list.

8 Q. By hand?

9 A. Correct.

10 Q. Just wrote down the names of all the companies
11 that were in there?

12 A. Every single one on the PowerPoint slide.

13 Q. You froze the frame --

14 A. And webinar.

15 Q. -- and then --

16 A. No. Just literally just paused it.

17 Q. Okay. What does the column on this tab
18 "Original," the column labeled "Time to Implement" mean?

19 A. Just other information that we could gather and
20 find.

21 Q. About?

22 A. They actually had on this -- on this webinar, they
23 had literally a slide that would say "Time to Implement,"
24 and they would brag about how fast or how slow it took them
25 to actually implement things. And all it was was recording

1 correct.

2 Q. Were you comparing it to the 2005 column?

3 A. No, because there was obviously nothing in the
4 2005 column in this particular example.

5 MR. PULGRAM: Those are my questions
6 before the lunch break.

7 THE VIDEOGRAPHER: Going off the
8 record. This marks the end of videotape
9 number 3 in the deposition of Softscape,
10 Inc., Rule 30(b)(6) designee David V.
11 Watkins. We're going off the record. The
12 time is 1:10.

13 (Recess.)

14 THE VIDEOGRAPHER: We're back on the
15 record. This marks the beginning of
16 videotape number 4 in the deposition of
17 Softscape, Inc., Rule 30(b)(6) designee
18 David V. Watkins. The time is 2:10.

19 BY MR. PULGRAM:

20 Q. Good afternoon.

21 A. Hello.

22 Q. Do you have today at Softscape actual copies of
23 the PowerPoints, web sites, and webinars that were used to
24 compile your list of 2005 customers for SuccessFactors?

25 A. I -- what I have at my disposal is the content

1 that's in the spreadsheet, the -- the various tabs. I

2 [REDACTED]

4 got copies of the website, the list of customers from
5 October, and then the Q1 '08 at some point in time.

6 Q. October of what year?

7 A. 2007.

8 Q. Do you have copies of the website that was used
9 for compiling the list of 2005 customers, or are you just
10 relying on the preexisting versions of the spreadsheet that
11 were rolled up into the summary?

12 A. Let's see. The -- I have the -- I have one page

13 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

23 multimedia one. I don't know an exact date.

24 Q. Was it in 2004 or 2005 or some other time?

25 A. I don't know.

Q.

1

[REDACTED]

SECRET

(b) (7)(C), (b) (7)(D)

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(b) (7)(C), (b) (7)(D)

● [REDACTED]

☐ ☐

[REDACTED]

[REDACTED]

1 March time frame.

2 Q. Can you be more specific, please?

3 A. No, I can't.

4 MR. PULGRAM: I don't have time to
5 address all of that right now, so I want to
6 shift for a moment to New Millennium Shoe.
7 We will come back to the customer campaign
8 either tomorrow or when we have the rest of
9 the documents about it.

10 Q. What is New Millenium Shoe?

11 A. It's a shoe store.

12 Q. Store?

13 A. Correct.

14 Q. One store?

15 A. It was three retail stores. Two and a half retail
16 stores.

17 Q. Where is it located?

18 A. It's located -- it was located in Puerto Rico.

19 Q. It's now one store?

20 A. It's actually now -- we've closed the retail
21 operations.

22 Q. Is there any operation remaining?

23 1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1 Q. When were the retail stores closed?

2 A. Sometime in 2007.

3 [1] [REDACTED]

[REDACTED]

[REDACTED]

6 Q. Is it a corporation?

7 A. It is a corporation.

8 [2] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Q. Does it engage in Internet sales?

21

A. It did.

22

Q. When?

23

A. In the two -- in the probably mid-2000 time frame.

24

It's quite some time ago they tried to do it.

25

3

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7

MR. DAVIDS: In that login?

8

Q.

2

9

10

11

12

13

MR. DAVIDS: Objection.

14

A. I don't recall.

15

Q. Did you log in to the New Millennium Shoe website

16

account at NSI from your home?

17

A. During what time period?

18

Q. During January of 2008.

19

A. I don't recall specifically logging in in January

20

2008. But if there would be -- if there was a potential

21

login, it most probably it was from me.

22

Q.

3

23

24

25

Q. Okay. How did it come about that New Millennium

1 Shoe contacted SuccessFactors?

2 A. I asked Ely Ann, Ely, to actually make an e-mail
3 inquiry and a phone call to gain access to their -- to
4 actually get -- to have the ability to actually participate
5 in their trial program.

6 Q. When did you ask her to do that?

7 A. Probably in the November time frame, maybe in
8 October. Somewhere in that vicinity.

9 Q. And when did she do so?

10 MR. DAVIDS: Objection.

11 A. Do so what?

12 Q. Did she contact SuccessFactors?

13 A. I believe she attempted to contact them in the
14 winter of 2007.

15 Q. Do you have an understanding of when she
16 succeeded?

17 A. Somewhere between December and I think February.

18 Q. Do you have any reason to disbelieve Mr.
19 Corrales's declaration that Ely Valls contacted
20 SuccessFactors on January 29th, 2008?

21 A. Do I have what?

22 Q. Any reason to disbelieve that.

23 A. Disbelieve that she contacted him in January of
24 2008.

25 Q. January 29th, 2008.

1 A. For the trial?

2 Q. For the trial version, as you call it.

3 | A. I don't recall specifically.

4 | 1 [REDACTED]

(b) [REDACTED]

1. [REDACTED]

Case	Case	Case
1	2	3

[Signature]

(b) (5) ACP, (b) (5) DCP, (b) (5) DPP, (b) (5) AWP

[illegible]

[illegible]

15 Q. Now, when -- do you differentiate the trial
16 version from the ACE demo site?

17 A. I -- I don't differentiate anything. I've got a
18 password and user ID to a trial version.

19 Q. Was the password and user ID e-mailed to you?

20 A. It was e-mailed to Ely at New Millennium Shoe.

21 Q. Was the trial version password sent in response to
22 an e-mail request or after some oral communications?

23 A. You know, the e-mail requests were back in 2007.
24 So I think the final -- the final information was sent via
25 e-mail. And I'm sure that they -- there was

1 Q. Did you discuss this plan with Hank Watkins?

2 A. What plan?

3 Q. What plan. The plan to use New Millennium as a
4 shell to gain access to a trial version of your
5 competitor's software.

6 MR. DAVIDS: Objection.

7 A. I didn't have a discussion about a shell with Hank
8 Watkins.

9 Q. Did you have a discussion with Hank Watkins about
10 using New Millennium Shoe as a means for you, as the CEO of
11 SuccessFactors' competitor, to gain access to its trial
12 version?

13 A. No, I did not.

14 Q. Did you have a discussion with any of the other
15 shareholders of the company?

16 A. No, I did not.

17 Q. Did you, sir, believe that if you had disclosed
18 that it was you, the CEO of Softscape, who was asking for a
19 trial version, that SuccessFactors would have given it to
20 you?

21 A. They would not have given it to me, correct.

22 Q. Did Ely Valls ever log in with you?

23 A. No.

24 Q. She just gave you the information and off you
25 went?

1 A. No.

2 Q. Don't know that term?

3 A. I do not know that term.

4 Q. You weren't familiar with that from the HP
5 pretexting scandal?

6 A. I don't know what that is.

7 Q. Okay. Now, did you obtain -- attend two
8 demonstrations by Jorge Corrales of the software, one in
9 Spanish and one in English?

10 A. Yes, I did.

11 Q. Was anyone else present for those presentations?

12 A. My wife.

13 Q. Anyone else?

14 A. No.

15 Q. So did your wife pretend to be Ely?

16 A. Yes.

17 Q. And for both presentations?

18 A. Yes.

19 Q. Did your wife also pretend to be Ely for other
20 telephone calls with SuccessFactors?

21 A. No, I don't believe so.

22 Q. Did Ely herself ever contact SuccessFactors
23 orally?

24 A. I believe so, yes.

25 Q. What occasions are you aware of?

1 A. I don't recall. I believe I was, yes.

2 Q. And your wife pretended to be Ely pretending to be
3 interested in buying the software?

4 A. That's correct.

5 Q. And then your wife -- you were sitting there in
6 the room with them?

7 A. Yes, I was.

8 Q. Watching the same screen?

9 A. Yes.

10 Q. And was that from your house?

11 A. That was from my house.

12 Q. Then the next occasion, did your wife come down to
13 the office?

14 A. She came into the office, correct.

15 Q. And you guys sat there and you pretended to be
16 who?

17 A. Jorge, I don't remember what we used as his last
18 name.

19 Q. Cruz?

20 A. I believe that was what it was.

21 Q. Actually, it was Javier Cruz, correct?

22 A. Correct.

23 Q. And you told Mr. Corrales that you were what?

24 A. I don't recall specifically what I told him I was.

25 Q. How did you explain to him that there was a man on

1 the phone with Ely?

2 A. Just that it was another employee at New
3 Millennium Shoe.

4 Q. Weren't you represented to have been a consultant
5 for New Millennium Shoe?

6 A. I don't recall specifically.

7 Q. And wasn't that the way by which you could have
8 such detailed knowledge and ask such detailed questions?

9 A. No, I don't believe that was the reason.

10 Q. Were you on the website -- strike that.

11 Were you in the password-protected account the day
12 before the first demonstration?

13 A. I don't remember the specific days, but the odds
14 are if somebody entered the account, it would have been me.

15 Q. And were you reviewing it to prepare questions to
16 be presented to Mr. Corrales?

17 A. I was reviewing it for intellectual property.

18 Q. For intellectual property.

19 A. Correct.

20 Q. What do you mean by that, sir?

21 A. Because I believed SuccessFactors misappropriated
22 my IP.

23 Q. So that was before the first demo, correct?

24 A. What was before the first demo?

25 Q. This review, because you thought that

1 A. No.

2 Q. Did you go on the password-protected site again
3 after Mr. Corrales's second presentation?

4 A. I attempted to.

5 Q. In fact, you were successful, weren't you?

6 A. No, I was not. Not to the best of my knowledge.
7 At some point after that demonstration, I was prevented
8 from going in.

9 MR. PULGRAM: We're going to change
10 the tape, go for a few more minutes, and
11 then we'll call it a day.

12 THE VIDEOGRAPHER: Going off the
13 record. This marks the end of tape number
14 5 in the deposition of Softscape, Inc.,
15 Rule 30(b)(6) designee David V. Watkins.
16 We're going off the record. The time is
17 5:10 p.m.

18 (Recess.)

19 THE VIDEOGRAPHER: We're back on the
20 record. This marks the beginning of
21 videotape number 6 in the deposition of
22 Softscape Inc., Rule 30(b)(6) designee
23 David V. Watkins. The time is 5:12.

24 BY MR. PULGRAM:

25 Q. Would you look at the declaration of Mr. Matheson

1 which we've marked as Exhibit 13. Turn to page 5, please.
2 It describes logins to the ACE sales demo on February 19th
3 at 8:00 a.m., 9:00 a.m., 2:00 p.m., and 3:00 p.m. Was that
4 you?

5 A. Most likely, yes.

6 Q. That's from the Softscape headquarters. He
7 describes access on February 21st for most of the day
8 starting at 8:00 a.m. That was you also?

9 MR. DAVIDS: You said it was from the
10 Softscape headquarters?

11 MR. PULGRAM: Yes.

12 A. It was accessed by the Softscape headquarters for
13 most of the day starting at 8:00 a.m. EST.

14 Q. Yes. Was that you?

15 A. On February 21? I don't recall specifically, but
16 most likely it was.

17 Q. The next entry -- well, let me stick with that one
18 for a second.

19 That was the same day as the second demo, correct?

20 A. I don't recall, but it was about that same day.

21 Q. Well, you were on pretty much the whole day before
22 the second demo started, correct?

23 A. I don't remember specifically, but it sounds about
24 right.

25 Q. Okay. And the record reflects the second demo was

1 on February 21st.

2 Let's go down to paragraph 15. That IP address,
3 24.34.56.79, that is your brother Rick's house, correct?

4 A. I believe so.

5 Q. And this reflects that the password-protected
6 account was accessed at 7:00 p.m. on February 18, the night
7 before the first demo, correct?

8 A. It says on February 18th it was accessed -- it was
9 accessed at 7:00 p.m. EST.

10 Q. Was that you?

11 A. I -- I am not understanding -- I'm just trying to
12 answer your question specifically. Most -- most likely it
13 was me, but I'm trying to understand what your specific
14 question -- you've got a couple of IP addresses here.
15 You've got the 98 one and the 24 one, and you've got dates.
16 So what are you specifically asking?

17 Q. I'm looking at paragraph 15. Are you?

18 A. Yes, I am.

19 Q. Okay. Paragraph 15 refers to the .79 IP address,
20 correct?

21 A. It does.

22 Q. Which we established was Rick Watkins. And it
23 refers to access at 7:00 p.m. on the 18th, the day before
24 the first demo. And my question is: Was that you?

25 A. To the best of my knowledge, yes.

1 Q. Why were you accessing it from Rick Watkins'?

2 A. I was showing him.

3 Q. And did you make notes at that time?

4 A. No.

5 Q. Do you have any notes from any of the times that
6 you accessed?

7 A. No.

8 Q. Immediately after one of your accesses, you sent
9 around a batch of information to be included in the knock-
10 off sheet, didn't you?

11 A. I did.

12 Q. And that was based on what you had seen?

13 A. That was based on what I had seen.

14 Q. That was right after the second demonstration; is
15 that correct?

16 A. I don't recall specifically, but it was somewhere
17 around there.

18 Q. And it was at about 2:00 in the morning, wasn't
19 it?

20 A. I don't recall the specific time, but that may
21 have been the case.

22 Q. The access from Rick Watkins on February 20th at
23 2:00 a.m. Eastern Standard Time, described in paragraph 15,
24 were you there at 2:00 a.m.?

25 A. Most probably, yes.

1 Q. You think he might have said, "Sure. Fine. Let
2 me give you the tour"?

3 MR. DAVIDS: Objection.

4 A. I don't know what Jorge Corrales would have said.

5 Q. As you sat there at that time on the phone with
6 him, you understood completely well that he would never
7 have given you one demonstration, let alone two, had he
8 known you were the CEO. Wasn't that your understanding?

9 MR. DAVIDS: Objection.

10 A. Can you please repeat the question.

11 MR. PULGRAM: Read it back, please.

12 (Question read.)

13 A. The CEO of Softscape?

14 Q. Yes.

15 A. If I told him I was the CEO of Softscape, he
16 probably would not have given me a demonstration.

17 Q. You understood that at the time?

18 A. I understood that at the time. I didn't ask Jorge
19 Corrales that, so I didn't understand what he would have
20 thought.

21 Q. Well, at that time, as you sat there using a fake
22 name, you understood that had you given your real name, you
23 wouldn't have gotten the demo?

24 MR. DAVIDS: Objection.

25 A. I do not know if Jorge Corrales knew who I was.

1 [REDACTED]

2 Q. Anyone else?

3 A. No. I don't recall anybody else.

4 Q. Was this posted to the SRC?

5 A. No, I don't even think I -- I gave this to
6 Christopher. I actually don't think I should -- I gave it
7 to anybody. I -- I don't recall giving this -- this to
8 anybody.

9 Q. Two of the pages from this proposal appear in the
10 presentation, correct?

11 A. Correct.

12 Q. Did you cut and paste them into The Naked Truth
13 document?

14 A. Yes, I did.

15 Q. Were there any discussions on the phone between
16 you and Mr. -- strike that.

17 Were there any discussions on the phone with Mr.
18 Corrales about the possibility of getting a proposal?

19 A. I don't recall specifically, but I -- I don't
20 remember.

21 (Discussion off the record.)

22 Q. Mr. Corrales has submitted a declaration in this
23 action that this proposal was delivered because Ely Valls
24 told him -- the person he thought to be Ely Valls told him
25 that she was making her decision in the next two days. Was

EXHIBIT 4

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12 Attorneys for Plaintiff SUCCESSFACTORS, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware
23 corporation,

24 Defendant.

Case No. CV 08-1376 CW

**PLAINTIFF'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS AND
THINGS (Nos. 1 – 16)**

25 Pursuant to the Court's order permitting the parties to initiate discovery and Rules 26 and
26 34 of the Federal Rules of Civil Procedure, SuccessFactors requests that Defendant Softscape,
27 Inc. ("Softscape") respond in writing to each of the following Requests and produce the
28 documents and things requested for inspection and copying, in accordance with the definitions

1 and instructions set forth below, at the offices of Fenwick & West LLP, 555 California Street,
2 Suite 1200, San Francisco, California 94104, within the time period permitted by the Federal
3 Rules of Civil Procedure.

4 DEFINITIONS

5 1. The terms "YOU," "YOUR," "DEFENDANT," or "SOFTSCAPE" mean and
6 include, collectively and/or individually, Softscape, Inc., and its parents, subsidiaries, affiliates,
7 predecessors or successor companies, if any, and its current and former officers, directors,
8 employees, consultants, attorneys, authorized agents, sales representatives, distributors, dealers,
9 direct and indirect contractors, and/or all other PERSONS acting or purporting to act on its behalf.

10 2. The terms "PLAINTIFF" or "SUCCESSFACTORS" mean and include,
11 collectively and/or individually, SuccessFactors, Inc., and its parents, subsidiaries, affiliates,
12 corporate divisions, predecessors or successor companies, if any, and its current and former
13 officers, directors, employees, consultants, attorneys, authorized agents, sales representatives,
14 distributors, dealers, direct and indirect contractors, and/or all other PERSONS acting or
15 purporting to act on its behalf.

16 3. The terms "PERSON" or "PERSONS" shall include both natural persons, corporate
17 or other business entities, and all other forms of legal entities, and shall include, but is not limited
18 to, the following: corporations, partnerships, joint ventures, associations, business organizations,
19 trade organizations, standards organizations, and sole proprietorships.

20 4. The terms "DOCUMENT" or "DOCUMENTS" have the broadest meaning
21 accorded that term by Fed. R. Civ. P. 34(a) and includes, but is not limited to, all of the items
22 defined in Fed. R. Evid. 1001, and all preliminary and final drafts of any such item. The terms
23 shall include, but not be limited to, all written, electronic, phonic, graphic, and recorded matter of
24 every type and description and every tangible thing that is or has been in YOUR possession,
25 custody, or control, to which YOU have access or of which YOU have knowledge.
26 "DOCUMENT(S)" shall also include, but shall not be limited to, the following items, whether
27 printed or recorded or reproduced by hand: agreements, contracts, leases, communications
28 (including intra-company communications), electronic mail, data from Personal Digital Assistants

(including handheld computers, “smart phones,” such as the palmOne™ Treo© and other similar devices and pagers), correspondence, postings on intranet or internet forums or websites (such as web pages and web logs or blogs), faxes, telegrams, cables, telexes, teletype messages, memoranda, records, books, diaries, notebooks calendars (paper, electronic and otherwise), telephone and other logs, telephone and other bills, voicemail and transcriptions thereof, recorded distributions, forecasts, statistical statements, accounts, invoices, purchase orders, receipts, billing records, tapes, expense vouchers, minutes, summaries and other records of meetings, conferences, negotiations, conversations, investigations and interviews, sales brochures and literature, advertisements, price lists, trade letters, press releases, stenographic, handwritten and any other notes, projections, working papers, checks (front and back), check stubs and receipts, models, surveys, devices, pictures, photographs, films, computer records, data compilations, and voice and video recordings. “DOCUMENT(S)” shall not be limited in any way as to the form of storage (such as paper, microfiche, magnetic tape, magnetic disk, CD-ROM, DVD, optical disk, flash memory drive, or other storage device). A draft or non-identical copy is a separate document within the meaning of this term.

5. The terms “COMMUNICATION” or “COMMUNICATIONS” refer to any exchange of information by any means of transmission and the sending or receipt of information of any kind by or through any means, including but not limited to speech, writings, documents, language (machine, foreign or otherwise) of any kind, computer electronics or electronic data, sound, radio or video signals, telecommunications, telephone, teletype, facsimile, telegram, microfilm, microfiche, photographic film of all types or other media of any kind. The terms “COMMUNICATION” and “COMMUNICATIONS” also include, without limitation, all meetings, notices, requests, response, demands, complaints, press, publicity or trade releases, and postings on intranet or internet forums or websites (such as web pages and web logs or blogs).

6. “PRESENTATION” means the document shown as Exhibit 1 to the Declaration of Robert Bernshteyn in Support of Plaintiff’s Ex Parte Application for a Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, including all components, formats, versions, portions, notes, and version data thereof.

1 ///

2 7. SUCCESSFACTORS' TRADEMARKS means the name SUCCESSFACTORS
3 and the logos registered with the United States Patent and Trademark Office with Serial Numbers
4 78660874, 78946750, 78706535, and 77248286.

5 8. The term "CONCERNING" means pertaining to, mentioning, commenting,
6 describing, analyzing, dealing with, resulting from, constituting, including, comprising, consisting
7 of, containing, referring to, reflecting, discussing, showing, stating, explaining, contradicting,
8 providing context to, evidencing, concerning, or recording a particular subject in whole or in part,
9 either directly or indirectly, or being in any way logically or factually connected with the matter
10 discussed or identified.

11 9. The terms "or" and "and" shall be read in the conjunctive and in the disjunctive
12 wherever they appear, and neither of these words shall be interpreted to limit the scope of these
13 Requests.

14 10. The words "any," "all," and "each" shall be construed as "all and each."

15 11. The use of a verb in any tense shall be construed as the use of the verb in all other
16 tenses.

17 12. The singular form of any word shall be deemed to include the plural. The plural
18 form of any word shall be deemed to include the singular.

19 INSTRUCTIONS

20 1. In responding to the following requests, furnish all available DOCUMENTS,
21 including documents in the possession, custody, or control of any of your attorneys, directors,
22 officers, agents, employees, representatives, associates, investigators or division affiliates,
23 partnerships, parents or subsidiaries, and persons under your control, not merely documents in your
24 direct possession.

25 2. All DOCUMENTS shall be organized and produced pursuant to Rule 34(b) of the
26 Federal Rules of Civil Procedure.

27 3. Electronic records and computerized information must be produced in an intelligible
28 format, together with a description of the system from which they were derived sufficient to permit

1 rendering the records and information intelligible. Electronic information must be produced in
2 native format.

3 4. If YOU are unable to comply with a demand for any DOCUMENT in full, YOU are
4 requested to specify, pursuant to Federal Rule of Civil Procedure 34, whether YOUR inability to
5 comply is because the DOCUMENT has never existed, has been destroyed, has been lost,
6 misplaced or stolen, and/or has never been, or is no longer in YOUR possession, custody or control.
7 The statement shall set forth the name and address of any PERSON or organization known or
8 believed by YOU to have possession, custody, or control of the DOCUMENT.

9 5. If any information requested is claimed to be privileged, immune from discovery or
10 otherwise not discoverable, YOU are requested to provide all information falling within the scope
11 of the document request which is discoverable, and for each item of information contained in a
12 document to which a claim of privilege is made, YOU must identify such document in a privilege
13 and/or redaction log pursuant to Federal Rule of Civil Procedure 26(b)(5), such identification to
14 include at least the following:

- 15 (1) the basis on which the privilege is claimed;
- 16 (2) the names and positions of the author of the document and all other persons
17 participating in the preparation of the document;
- 18 (3) the name and position of each individual or other person to whom the
19 document, or a copy thereof, was sent or otherwise disclosed;
- 20 (4) where not apparent, the relationship of the author, writer, sender, initiator,
21 addressee or any other recipient with each other;
- 22 (5) the date of creation or transmittal indicated on each document, or an
23 estimate of that date, indicated as such, if no date appears on the document;
- 24 (6) a description of any accompanying material transmitted with or attached to
25 such document;
- 26 (7) the number of pages in such document;
- 27 (8) the particular document request to which such document is responsive; and

28 ///

(9) the general subject matter and whether any business or non-legal matter is contained or discussed in such document.

6. Each Request for DOCUMENTS seeks production of all DOCUMENTS described along with any attachments, drafts, and non-identical copies in any language whatsoever, in the possession, custody or control of YOU or YOUR respective agents or all available information, including such information as becomes available to YOU after YOUR answers hereto are served.

7. Unless otherwise specified, each Request for DOCUMENTS seeks production of all DOCUMENTS created or modified on or after January 1, 2007.

DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1:

ALL DOCUMENTS CONCERNING the genesis, creation, review, or revision of the PRESENTATION, including but not limited to any components, formats, versions, portions, edits, memoranda, notes, e-mails, embedded objects, file histories, version data, or document management system logs.

DOCUMENT REQUEST NO. 2:

ALL DOCUMENTS CONCERNING potential, intended, or actual recipients of the PRESENTATION or of any COMMUNICATIONS about the PRESENTATION, including but not limited to lists of recipients, sales or marketing efforts directed at those recipients, and communications involving SOFTSCAPE's employees, customers, or other third parties about the recipients.

DOCUMENT REQUEST NO. 3:

ALL DOCUMENTS CONCERNING any facts received from SUCCESSFACTORS' actual or potential customers and included in the PRESENTATION, or the compilation of such facts as described on page 2 of the PRESENTATION.

DOCUMENT REQUEST NO. 4:

ALL DOCUMENTS CONCERNING any assertions in the PRESENTATION, including but not limited to DOCUMENTS that support or refute those assertions.

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DOCUMENT REQUEST NO. 5:

ALL COMMUNICATIONS CONCERNING the PRESENTATION, including but not limited to COMMUNICATIONS between or involving SOFTSCAPE employees, its customers, or current or former SUCCESSFACTORS employees.

DOCUMENT REQUEST NO. 6:

ALL COMMUNICATIONS between SOFTSCAPE and Sears, Regions Bank, Intelsat, David Sinkfield, ICMA Retirement, Harris-Williams, and any current or former SUCCESSFACTORS employee or consultant regarding SUCCESSFACTORS, its products, services, employees, business, or actual or prospective customers.

DOCUMENT REQUEST NO. 7:

ALL DOCUMENTS created or modified after February 2007 CONCERNING SUCCESSFACTORS, its products, services, employees, business, or actual or prospective customers, including but not limited to all materials obtained from SUCCESSFACTORS' website, online customer community, webinars, or online demonstration environments, including but not limited to copies of webpages or the content therein.

DOCUMENT REQUEST NO. 8:

ALL DOCUMENTS CONCERNING or showing access from any SOFTSCAPE computer to SUCCESSFACTORS's website, online customer community, or online demonstration environments, including but not limited to DOCUMENTS CONCERNING web browser history files, system logs, user names, passwords, user "ACE275," or any copy of a SUCCESSFACTOR webpage or its contents.

DOCUMENT REQUEST NO. 9:

ALL DOCUMENTS CONCERNING the user name "John Anonymous" or associated e-mail address "hcmknowledge2008a@gmail.com" to the extent that they mention the PRESENTATION or SOFTSCAPE, SUCCESSFACTORS, or their products, services, employees, business, or actual or prospective customers.

DOCUMENT REQUEST NO. 10:

A true and accurate bit for bit copy of the data storage media for any computer used by

David Watkins for work concerning SOFTSCAPE or SUCCESSFACTORS.

DOCUMENT REQUEST NO. 11:

A true and accurate bit for bit copy of the data storage media for any computer used by Dennis Martinek for work concerning SOFTSCAPE or SUCCESSFACTORS.

DOCUMENT REQUEST NO. 12:

A true and accurate bit for bit copy of the data storage media for any computer that was involved in the creation, modification, collection of information for, sharing, or e-mailing of the PRESENTATION.

DOCUMENT REQUEST NO. 13:

ALL DOCUMENTS CONCERNING contracts, licenses, or agreements, whether actual or prospective, between SOFTSCAPE and any recipients of the PRESENTATION or any SUCCESSFACTORS customers mentioned in the PRESENTATION.

DOCUMENT REQUEST NO. 14:

ALL DOCUMENTS CONCERNING the relationship of Javier Cruz, Ely Valls, or New Millenium Shoe or New Millennium Shoe with David Watkins, SOFTSCAPE or SUCCESSFACTORS, including but not limited to COMMUNICATIONS among any of them.

DOCUMENT REQUEST NO. 15:

ALL DOCUMENTS CONCERNING SOFTSCAPE's procurement, copying, or use of SUCCESSFACTORS' TRADEMARKS or PowerPoint templates.


DOCUMENT REQUEST NO. 16:

ALL DOCUMENTS reflecting articles of incorporation, bylaws, corporate registration, and domain name registration for New Millenium Shoe.

Dated: March 28, 2008

FENWICK & WEST LLP

By:



Patrick E. Premo

Attorneys for Plaintiff SUCCESSFACTORS, INC.

1282989

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 5

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7 Attorneys for Defendant SOFTSCAPE, INC.

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION
12

13 SUCCESSFACTORS, INC.,

14 Plaintiff,

15 v.

16 SOFTSCAPE, INC.,

17 Defendant.
18
19
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23
24
25
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27
28

Case No.: C-08-1376 (CW)

**DEFENDANT SOFTSCAPE, INC.'S
RESPONSE TO PLAINTIFF'S FIRST SET
OF REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS**

1 PROPOUNDING PARTY: Plaintiff SUCCESSFACTORS, INC.

2 RESPONDING PARTY: Defendant SOFTSCAPE, INC.

3 SET NO.: One (1)

4 Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant
5 SOFTSCAPE, INC. ("Softscape") hereby responds to the First Set Requests for Production of
6 Documents ("Requests") served by Plaintiff SUCCESSFACTORS, INC. ("SuccessFactors"), as
7 follows:

8 **GENERAL OBJECTIONS TO REQUESTS FOR PRODUCTION**

9 The following general objections apply to each separately numbered document request
10 contained in these Requests, and are incorporated by this reference, to the extent applicable, into
11 each specific response, as if set forth in full.

12 1. Softscape objects to each request to the extent it purports to seek the production of
13 documents that are protected by the attorney-client privilege, work product doctrine, common
14 interest privilege, and/or any other applicable privilege. The inadvertent production of any
15 privileged document is not to be deemed a waiver of privilege, and Softscape reserves the right to
16 object to the introduction or any other use of any privileged or protected documents that may be
17 inadvertently produced. Any agreement to produce documents responsive to a request is not an
18 acknowledgment that any such documents exist.

19 2. Softscape objects to each request to the extent it purports to seek the production of
20 documents that are protected by privacy rights under the California or United States Constitutions
21 or state or federal law, or by any other confidentiality protections.

22 3. Softscape objects to each request to the extent it seeks documents outside of
23 Softscape's possession, custody or control.

24 4. Softscape objects to each request to the extent it purports to seek the production of
25 documents that are not relevant to the subject matter of the underlying action, and not reasonably
26 calculated to lead to discovery of admissible evidence.

27 5. Softscape objects to each request as overbroad, unduly burdensome, not relevant to
28 the subject matter of the underlying action, and not reasonably calculated to lead to discovery of

1 admissible evidence, to the extent the request seeks production of documents that were created
2 before January 1, 2008, the first date of factual allegations against Softscape.

3 6. Softscape objects that the Requests seek to have Softscape furnish information and
4 identify documents that are a matter of the public record, and therefore, are equally available to the
5 propounding party as they are to Softscape.

6 7. Softscape objects that the Requests seek to have Softscape furnish information and
7 identify documents that are proprietary to Softscape and contain confidential or trade secret
8 information.

9 8. Softscape objects to the extent that the Requests purport to impose on Softscape
10 obligations or responsibilities in excess of those imposed by the Federal Rules of Civil Procedure,
11 the applicable Local Rules, any other applicable rules, case law, statutes governing the proper
12 scope of discovery, or applicable Court orders.

13 9. Softscape objects that the definition of "PRESENTATION" in these Requests is
14 overbroad, compound, and unduly burdensome. In responding to these Requests, Softscape will
15 interpret the term "PRESENTATION" to mean the document attached as Exhibit 1 to the
16 Declaration of Robert Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary
17 Restraining Order and Order to Show Cause re Preliminary Injunction, filed March 11, 2008,
18 bearing control numbers SF00000001-SF00000043.

19 10. At this early stage, Softscape has not completed its investigation of facts, witnesses
20 or documents relating to this case; has not completed discovery in this action; has not completed
21 its analysis of available data; and has not completed its preparations for the preliminary injunction
22 hearing. Thus, although a good faith effort has been made to conduct a diligent search and to
23 supply pertinent documents when they have been requested, and a reasonable inquiry has been
24 made in an effort to comply with these Requests, it has not been possible in some instances to
25 make unqualified responses. Further, the responses are necessarily made without prejudice to
26 Softscape's rights to produce evidence of any subsequently discovered facts, witnesses or
27 documents. Softscape provides its responses based on its understanding of the claims as set forth
28

1 in the pleadings currently on file in this case, as of the date these responses are made, and has
2 furnished such information as is presently available to it.

3
4 **RESPONSES TO REQUEST FOR PRODUCTION**

5 **REQUEST FOR PRODUCTION NO. 1:**

6 ALL DOCUMENTS CONCERNING the genesis, creation, review or revision of the
7 PRESENTATION, including but not limited to any components, formats, versions, portions, edits,
8 memoranda, notes, e-mails, embedded objects, file histories, version data, or document
9 management system logs.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

11 Softscape objects to this request to the extent it calls for the production of material
12 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
13 objects to this request to the extent that it calls for confidential, proprietary information.

14 Subject to the foregoing specific and general objections, Softscape will produce non-
15 privileged relevant, responsive documents in its possession, custody or control that are related to
16 the creation, modification and dissemination of the PRESENTATION.

17 **REQUEST FOR PRODUCTION NO. 2:**

18 ALL DOCUMENTS CONCERNING potential, intended, or actual recipients of the
19 PRESENTATION or of any COMMUNICATIONS about the PRESENTATION, including but
20 not limited to lists of recipients, sales or marketing efforts directed at those recipients, and
21 communications involving SOFTSCAPE's employees, customers, or other third parties about the
22 recipients.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

24 Softscape objects to this request to the extent it calls for the production of material
25 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
26 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
27 further objects to this request because it is overbroad as to both time and scope, rendering a
28 response unduly burdensome. To the extent this request seeks documents unrelated to the

1 PRESENTATION, Softscape also objects.

2 Subject to the foregoing specific and general objections, Softscape will produce non-
3 privileged relevant, responsive documents in its possession, custody or control that are related to
4 the creation, modification and dissemination of the PRESENTATION.

5 **REQUEST FOR PRODUCTION NO. 3:**

6 ALL DOCUMENTS CONCERNING any facts received from SUCCESSFACTORS'
7 actual or potential customers and included in the PRESENTATION, or in the compilation of such
8 facts as described on page 2 of the PRESENTATION.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

10 Softscape objects to this request to the extent it calls for the production of material
11 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
12 objects to this request to the extent that it calls for confidential, proprietary information.

13 Subject to the foregoing specific and general objections, Softscape will produce non-
14 privileged relevant, responsive documents in its possession, custody or control that are related to
15 the creation, modification and dissemination of the PRESENTATION.

16 **REQUEST FOR PRODUCTION NO. 4:**

17 ALL DOCUMENTS CONCERNING any assertions in the PRESENTATION, including
18 but not limited to DOCUMENTS that support or refute those assertions.

19 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

20 Softscape objects to this request to the extent it calls for the production of material
21 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
22 objects to this request to the extent that it calls for confidential, proprietary information.

23 Subject to the foregoing specific and general objections, Softscape will produce non-
24 privileged relevant, responsive documents in its possession, custody or control that are related to
25 the creation, modification and dissemination of the PRESENTATION.

26 **REQUEST FOR PRODUCTION NO. 5:**

27 ALL COMMUNICATIONS CONCERNING the PRESENTATION, including but not
28 limited to COMMUNICATIONS between or involving SOFTSCAPE employees, its customers, or

1 current or former SUCCESSFACTORS employees.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

3 Softscape objects to this request to the extent it calls for the production of material
4 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
5 objects to this request to the extent that it calls for confidential, proprietary information.

6 Subject to the foregoing specific and general objections, Softscape will produce non-
7 privileged relevant, responsive documents in its possession, custody or control that are related to
8 the creation, modification and dissemination of the PRESENTATION.

9 **REQUEST FOR PRODUCTION NO. 6:**

10 ALL COMMUNICATIONS between SOFTSCAPE and Sears, Regions Bank, Intelsat,
11 David Sinkfield, ICMA Retirement, Harris-Williams, and any current or former
12 SUCCESSFACTORS employee or consultant regarding SUCCESSFACTORS, its products,
13 services, employees, business, or actual or prospective customers.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

15 Softscape objects to this request to the extent it calls for the production of material
16 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
17 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
18 further objects to this request because it is compound, vague, and overbroad as to both time and
19 scope, rendering a response unduly burdensome. To the extent this request seeks documents
20 unrelated to the PRESENTATION, Softscape also objects. Softscape further objects to this
21 request on the grounds that it is vague and ambiguous because it requires Softscape to speculate
22 about the identity of SuccessFactors' "prospective customers" or its "current or former"
23 employees.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that are related to
26 the creation, modification and dissemination of the PRESENTATION.

27 **REQUEST FOR PRODUCTION NO. 7:**

28 ALL DOCUMENTS created or modified after February 2007 CONCERNING

1 SUCCESSFACTORS, its products, services, employees, business, or actual or prospective
 2 customers, including but not limited to all materials obtained from SUCCESSFACTORS' website,
 3 online customer community, webinars, or online demonstration environments, including but not
 4 limited to copies of webpages or the content therein.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

6 Softscape objects to this request to the extent it calls for the production of material
 7 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
 8 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
 9 further objects to this request because it is overbroad as to both time and scope, rendering a
 10 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
 11 access of its online demonstration environment occurred sometime after January 2008. To the
 12 extent this request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
 13 demonstration environments, which are the subject of this action, Softscape also objects.
 14 Softscape further objects to this request on the grounds that it is vague and ambiguous because it
 15 requires Softscape to speculate about the identity of SuccessFactors' "prospective customers" or
 16 "employees."

17 Subject to the foregoing specific and general objections, Softscape will produce non-
 18 privileged relevant, responsive documents in its possession, custody or control that are related to
 19 SuccessFactors' online demonstration environments.

20 **REQUEST FOR PRODUCTION NO. 8:**

21 ALL DOCUMENTS CONCERNING or showing access from any SOFTSCAPE computer
 22 to SUCCESSFACTORS's [sic] website, online customer community, or online demonstration
 23 environments, including but not limited to DOCUMENTS CONCERNING web browser history
 24 files, system logs, user names, passwords, user "ACE275," or any copy of a SUCCESSFACTOR
 25 webpage or its contents.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

27 Softscape objects to this request to the extent it calls for the production of material
 28 protected by attorney-client privilege or the attorney work product doctrine. Softscape further

1 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
2 further objects to this request because it is overbroad as to both time and scope, rendering a
3 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
4 access of its online demonstration environment occurred sometime after January 2008. To the
5 extent this request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
6 demonstration environments, which are the subject of this action, Softscape also objects. To the
7 extent this request seeks information that is publicly available or that is already in SuccessFactors'
8 possession, Softscape also objects.

9 Subject to the foregoing specific and general objections, Softscape will produce non-
10 privileged relevant, responsive documents in its possession, custody or control that are related to
11 SuccessFactors' online demonstration environments.

12 **REQUEST FOR PRODUCTION NO. 9:**

13 ALL DOCUMENTS CONCERNING the user name "John Anonymous" or associated e-
14 mail address "hemknowledge2008a@gmail.com" to the extent that they mention the
15 PRESENTATION or SOFTSCAPE, SUCCESSFACTORS, or their products, services, employees,
16 business, or actual or prospective customers.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

18 Softscape objects to this request to the extent it calls for the production of material
19 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
20 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
21 further objects to this request because it is overbroad as to both time and scope, rendering a
22 response unduly burdensome. To the extent this request seeks documents unrelated to the
23 PRESENTATION, Softscape also objects. Softscape further objects to this request on the grounds
24 that it is vague and ambiguous because it requires Softscape to speculate about the identity of
25 SuccessFactors' "prospective customers" or "employees."

26 Subject to the foregoing specific and general objections, Softscape will produce non-
27 privileged relevant, responsive documents in its possession, custody or control that are related to
28 the creation, modification and dissemination of the PRESENTATION.

REQUEST FOR PRODUCTION NO. 10:

A true and accurate bit for bit copy of the data storage media for any computer used by David Watkins for work concerning SOFTSCAPE or SUCCESSFACTORS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized access of its online demonstration environment occurred sometime after January 2008 and the distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this request seeks documents unrelated to the PRESENTATION or SuccessFactor's online demonstration environments, which are the subject of this action, Softscape also objects.

Softscape further objects to this request to the extent it seeks documents or things that are protected by privacy rights under the California, Massachusetts or United States Constitutions or state or federal law, or by any other confidentiality protections. As Softscape has attested under oath, it has made forensic copies of the computers known to have been used to create, modify or revise the PRESENTATION, and has made forensic copies of the computers known to have accessed SuccessFactor's online demonstration environments. There is no requirement under the Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

REQUEST FOR PRODUCTION NO. 11:

A true and accurate bit for bit copy of the data storage media for any computer used by Dennis Martinek for work concerning SOFTSCAPE or SUCCESSFACTORS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a

1 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
2 access of its online demonstration environment occurred sometime after January 2008 and the
3 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
4 request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
5 demonstration environments, which are the subject of this action, Softscape also objects.

6 Softscape further objects to this request to the extent it seeks documents or things that are
7 protected by privacy rights under the California, Massachusetts or United States Constitutions or
8 state or federal law, or by any other confidentiality protections. As Softscape has attested under
9 oath, it has made forensic copies of the computers known to have been used to create, modify or
10 revise the PRESENTATION, and has made forensic copies of the computers known to have
11 accessed SuccessFactor's online demonstration environments. There is no requirement under the
12 Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

13 **REQUEST FOR PRODUCTION NO. 12:**

14 A true and accurate bit for bit copy of the data storage for any computer that was involved
15 in the creation, modification, collection of information for, sharing, or e-mailing of the
16 PRESENTATION.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

18 Softscape objects to this request to the extent it calls for the production of material
19 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
20 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
21 further objects to this request because it is overbroad as to both time and scope, rendering a
22 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
23 access of its online demonstration environment occurred sometime after January 2008 and the
24 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
25 request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
26 demonstration environments, which are the subject of this action, Softscape also objects.

27 Softscape further objects to this request to the extent it seeks documents or things that are
28 protected by privacy rights under the California, Massachusetts or United States Constitutions or

1 state or federal law, or by any other confidentiality protections. As Softscape has attested under
2 oath, it has made forensic copies of the computers known to have been used to create, modify or
3 revise the PRESENTATION, and has made forensic copies of the computers known to have
4 accessed SuccessFactor's online demonstration environments. There is no requirement under the
5 Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

6 **REQUEST FOR PRODUCTION NO. 13:**

7 ALL DOCUMENTS CONCERNING contracts, licenses, or agreements, whether actual or
8 prospective, between SOFTSCAPE and any recipients of the PRESENTATION or any
9 SUCCESSFACTORS customers mentioned in the PRESENTATION.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

11 Softscape objects to this request to the extent it calls for the production of material
12 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
13 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
14 further objects to this request because it is overbroad as to both time and scope, rendering a
15 response unduly burdensome. The Complaint alleges that the distribution of the
16 PRESENTATION occurred on or about March 4, 2008. Softscape further objects to this request
17 on the grounds that it seeks documents that are entirely unrelated to the PRESENTATION.
18 Documents concerning Softscape's customers, including any contracts, licenses or agreements
19 with any such customers, are irrelevant to the subject matter of this case.

20 **REQUEST FOR PRODUCTION NO. 14:**

21 ALL DOCUMENTS CONCERNING the relationship of Javier Cruz, Ely Valls, or New
22 Millenium Shoe or New Millennium Shoe with David Watkins, SOFTSCAPE or
23 SUCCESSFACTORS, including but not limited to COMMUNICATIONS among any of them.

24 **RESPONSE FOR REQUEST FOR PRODUCTION NO. 14:**

25 Softscape objects to this request to the extent it calls for the production of material
26 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
27 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
28 further objects to this request because it is overbroad as to both time and scope, rendering a

1 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
 2 access of its online demonstration environment occurred sometime after January 2008 and the
 3 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
 4 request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
 5 demonstration environments, which are the subject of this action, Softscape also objects.

6 Subject to the foregoing specific and general objections, Softscape will produce non-
 7 privileged relevant, responsive documents in its possession, custody or control that are related to
 8 the creation, modification and dissemination of the PRESENTATION, and SuccessFactors' online
 9 demonstration environments.

10 **REQUEST FOR PRODUCTION NO. 15:**

11 ALL DOCUMENTS CONCERNING SOFTSCAPE's procurement, copying, or use of
 12 SUCCESSFACTORS' TRADEMARKS or PowerPoint templates.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

14 Softscape objects to this request to the extent it calls for the production of material
 15 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
 16 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
 17 further objects to this request because it is overbroad as to both time and scope, rendering a
 18 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
 19 access of its online demonstration environment occurred sometime after January 2008 and the
 20 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
 21 request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
 22 demonstration environments, which are the subject of this action, Softscape also objects.

23 Subject to the foregoing specific and general objections, Softscape will produce non-
 24 privileged relevant, responsive documents in its possession, custody or control that are related to
 25 the creation, modification and dissemination of the PRESENTATION, and SuccessFactors' online
 26 demonstration environments.

27 **REQUEST FOR PRODUCTION NO. 16:**

28 ALL DOCUMENTS reflecting articles of incorporation, bylaws, corporate registration,

1 and domain name registration for New Millenium Shoe.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

3 Softscape objects to this request to the extent it calls for the production of material
4 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
5 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
6 further objects to this request because it is overbroad as to both time and scope, rendering a
7 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
8 access of its online demonstration environment occurred sometime after January 2008 and the
9 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
10 request seeks documents unrelated to the PRESENTATION or SuccessFactor's online
11 demonstration environments, which are the subject of this action, Softscape also objects.
12 Softscape further objects to this request to the extent it seeks documents that are outside the scope
13 of a Rule 34 request to a party. This request seeks documents in the possession, custody and
14 control of a third party witness, which requires a subpoena directed to that witness under Rule 45.

15
16 Dated: May 1, 2008

TAYLOR & COMPANY LAW OFFICES, LLP

17
18 By: 

19 Jessica L. Grant

20 Attorneys for Defendant SOFTSCAPE, INC.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Ferry Building, Suite 355.

On May 1, 2008, I served true copies of the following document(s) described as **DEFENDANT SOFTSCAPE, INC.'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** on the interested parties in this action as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address jlim@tcolaw.com to the person at the e-mail address listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mr. Patrick E. Premo
Fenwick & West LLP
801 California Street
Mountain View, CA 94041
E-Mail: ppremo@fenwick.com

Counsel for SuccessFactors

BY PERSONAL SERVICE: I caused the foregoing documents to be served by hand on the following individual as indicated on the "Declaration of Personal Service" attached hereto as Exhibit A. The person who delivered a true and correct copy of such documents to the person identified below is identified in Exhibit A attached hereto.

Mr. Laurence F. Pulgram
Fenwick & West LLP
555 California Street, 12th Floor
San Francisco, CA 94104

Counsel for SuccessFactors

1 I declare under penalty of perjury, under the laws of the United States of America, that the
2 foregoing is true and correct and that I am employed in the office of a member of the bar of this
3 Court at whose direction the service was made.

4 Executed on May 1, 2008, at San Francisco, California.

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7 _____
8 Jennifer M. Lim
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EXHIBIT A

DECLARATION OF PERSONAL SERVICE

I, Michael J. Portman, declare as follows:

1. I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Taylor & Company Law Offices, LLP, One Ferry Building, Suite 355, San Francisco, California 94111.

2. On May 1, 2008, I served counsel for plaintiff SuccessFactors, Inc., Laurence F. Pulgram of Fenwick & West, LLP, by personally delivering a true and correct copy of the documents described below in a sealed envelope, with the name and address of the person served shown on the envelope:

DEFENDANT SOFTSCAPE, INC.'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct. Executed on May 1, 2008, at San Francisco, California.

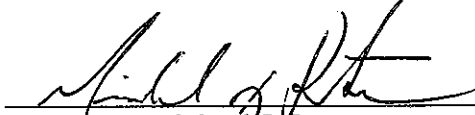

Michael J. Portman

EXHIBIT 6

1 ROBERT P. TAYLOR (SBN 46046)
Email: rptaylor@mintz.com
2 BRYAN J. SINCLAIR (SBN 205885)
Email: bsinclair@mintz.com
3 JEFFREY M. RATINOFF (SBN 197241)
Email: jratinoff@mintz.com
4 MINTZ LEVIN COHN FERRIS GLOVSKY AND
POPEO, PC
5 1400 Page Mill Road
Palo Alto, California 94304-1124
6 Telephone: (650) 251-7700
Facsimile: (650) 251-7739
7

8 Attorneys for Defendant,
SOFTSCAPE, INC.
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 SUCCESSFACTORS, INC, a Delaware
corporation,

14 Plaintiff,

15 vs.

16 SOFTSCAPE, INC., a Delaware corporation,
17 and DOES 1-10, inclusive,

18 Defendants.
19

Case No. CV 08-1376 CW (BZx)

**DEFENDANT SOFTSCAPE, INC.'S
AMENDED RESPONSES AND
OBJECTIONS TO PLAINTIFF'S FIRST
SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS AND
THINGS**

20 PROPOUNDING PARTY: Plaintiff SUCCESSFACTORS, INC.

21 RESPONDING PARTY: Defendant SOFTSCAPE, INC.

22 SET NO.: One (1) - Amended Responses

23 Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant

24 SOFTSCAPE, INC. ("Softscape") hereby responds to the First Set Requests for Production of
25 Documents ("Requests") served by Plaintiff SUCCESSFACTORS, INC. ("SuccessFactors"), as
26 follows:

27 ///

28 ///

GENERAL OBJECTIONS TO REQUESTS FOR PRODUCTION

The following general objections apply to each separately numbered document request contained in these Requests, and are incorporated by this reference, to the extent applicable, into each specific response, as if set forth in full.

1. Softscape objects to each request to the extent it purports to seek the production of documents that are protected by the attorney-client privilege, work product doctrine, common interest privilege, and/or any other applicable privilege. The inadvertent production of any privileged document is not to be deemed a waiver of privilege, and Softscape reserves the right to object to the introduction or any other use of any privileged or protected documents that may be inadvertently produced. Any agreement to produce documents responsive to a request is not an acknowledgment that any such documents exist.

2. Softscape objects to each request to the extent it purports to seek the production of documents that are protected by privacy rights under the California or United States Constitutions or state or federal law, or by any other confidentiality protections.

3. Softscape objects to each request to the extent it seeks documents outside of Softscape's possession, custody or control.

4. Softscape objects to each request to the extent it purports to seek the production of documents that are not relevant to the subject matter of the underlying action, and not reasonably calculated to lead to discovery of admissible evidence.

5. Softscape objects to each request as overbroad, unduly burdensome, not relevant to the subject matter of the underlying action, and not reasonably calculated to lead to discovery of admissible evidence, to the extent the request seeks production of documents that were created before January 1, 2008, the first date of factual allegations against Softscape.

6. Softscape objects that the Requests seek to have Softscape furnish information and identify documents that are a matter of the public record, and therefore, are equally available to the propounding party as they are to Softscape.

7. Softscape objects that the Requests seek to have Softscape furnish information and identify documents that are proprietary to Softscape and contain confidential or trade secret

1 information.

2 8. Softscape objects to the extent that the Requests purport to impose on Softscape
3 obligations or responsibilities in excess of those imposed by the Federal Rules of Civil Procedure,
4 the applicable Local Rules, any other applicable rules, case law, statutes governing the proper scope
5 of discovery, or applicable Court orders.

6 9. Softscape objects that the definition of "PRESENTATION" in these Requests is
7 overbroad, compound, and unduly burdensome. In responding to these Requests, Softscape will
8 interpret the term "PRESENTATION" to mean the document attached as Exhibit 1 to the
9 Declaration of Robert Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary
10 Restraining Order and Order to Show Cause re Preliminary Injunction, filed March 11, 2008,
11 bearing control numbers SF000000001-SF000000043.

12 10. At this early stage, Softscape has not completed its investigation of facts, witnesses
13 or documents relating to this case; has not completed discovery in this action; has not completed its
14 analysis of available data; and has not completed its preparations for the preliminary injunction
15 hearing. Thus, although a good faith effort has been made to conduct a diligent search and to
16 supply pertinent documents when they have been requested, and a reasonable inquiry has been
17 made in an effort to comply with these Requests, it has not been possible in some instances to make
18 unqualified responses. Further, the responses are necessarily made without prejudice to Softscape's
19 rights to produce evidence of any subsequently discovered facts, witnesses or documents. Softscape
20 provides its responses based on its understanding of the claims as set forth in the pleadings currently
21 on file in this case, as of the date these responses are made, and has furnished such information as is
22 presently available to it.

23 **RESPONSES TO REQUEST FOR PRODUCTION**

24 **REQUEST FOR PRODUCTION NO. 1:**

25 ALL DOCUMENTS CONCERNING the genesis, creation, review or revision of the
26 PRESENTATION, including but not limited to any components, formats, versions, portions, edits,
27 memoranda, notes, e-mails, embedded objects, file histories, version data, or document management
28 system logs.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control that are related to the genesis, creation, review or revision of the PRESENTATION.

REQUEST FOR PRODUCTION NO. 2:

ALL DOCUMENTS CONCERNING potential, intended, or actual recipients of the PRESENTATION or of any COMMUNICATIONS about the PRESENTATION, including but not limited to lists of recipients, sales or marketing efforts directed at those recipients, and communications involving SOFTSCAPE's employees, customers, or other third parties about the recipients.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for third party confidential, proprietary information.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control dated between January 1, 2008 and the present relating to communications about the PRESENTATION with any recipients of the PRESENTATION.

REQUEST FOR PRODUCTION NO. 3:

ALL DOCUMENTS CONCERNING any facts received from SUCCESSFACTORS' actual or potential customers and included in the PRESENTATION, or in the compilation of such facts as described on page 2 of the PRESENTATION.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for third party confidential, proprietary information.

1 Subject to the foregoing specific and general objections, Softscape will produce non-
2 privileged relevant, responsive documents in its possession, custody or control that are related to
3 any facts included in the PRESENTATION.

4 **REQUEST FOR PRODUCTION NO. 4:**

5 ALL DOCUMENTS CONCERNING any assertions in the PRESENTATION, including but
6 not limited to DOCUMENTS that support or refute those assertions.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

8 Softscape objects to this request to the extent it calls for the production of material protected
9 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
10 request to the extent that it calls for third party confidential, proprietary information.

11 Subject to the foregoing specific and general objections, Softscape will produce non-
12 privileged relevant, responsive documents in its possession, custody or control that are related to
13 any assertions in the PRESENTATION and/or which support or refute those assertions.

14 **REQUEST FOR PRODUCTION NO. 5:**

15 ALL COMMUNICATIONS CONCERNING the PRESENTATION, including but not
16 limited to COMMUNICATIONS between or involving SOFTSCAPE employees, its customers, or
17 current or former SUCCESSFACTORS employees.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

19 Softscape objects to this request to the extent it calls for the production of material protected
20 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
21 request to the extent that it calls for third party confidential, proprietary information.

22 Subject to the foregoing specific and general objections, Softscape will produce non-
23 privileged relevant, responsive documents in its possession, custody or control that are related to
24 any communications concerning the PRESENTATION.

25 **REQUEST FOR PRODUCTION NO. 6:**

26 ALL COMMUNICATIONS between SOFTSCAPE and Sears, Regions Bank, Intelsat,
27 David Sinkfield, ICMA Retirement, Harris-Williams, and any current or former
28 SUCCESSFACTORS employee or consultant regarding SUCCESSFACTORS, its products,

1 services, employees, business, or actual or prospective customers.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

3 Softscape objects to this request to the extent it calls for the production of material protected
4 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
5 request to the extent that it calls for third party confidential, proprietary information. Softscape
6 further objects to this request on the grounds that it is vague and ambiguous because it requires
7 Softscape to speculate about the identity of SuccessFactors' "prospective customers" or its "current
8 or former" employees.

9 Subject to the foregoing specific and general objections, Softscape will produce non-
10 privileged relevant, responsive documents in its possession, custody or control that are related to
11 communications between SOFTSCAPE and Sears, Regions Bank, Intelsat, David Sinkfield, ICMA
12 Retirement, Harris-Williams, and any known current or former SUCCESSFACTORS employee or
13 consultant regarding any facts appearing in the PRESENTATION.

14 **REQUEST FOR PRODUCTION NO. 7:**

15 ALL DOCUMENTS created or modified after February 2007 CONCERNING
16 SUCCESSFACTORS, its products, services, employees, business, or actual or prospective
17 customers, including but not limited to all materials obtained from SUCCESSFACTORS' website,
18 online customer community, webinars, or online demonstration environments, including but not
19 limited to copies of webpages or the content therein.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

21 Softscape objects to this request to the extent it calls for the production of material protected
22 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
23 request because it is overbroad as to both time and scope, rendering a response unduly burdensome.
24 Softscape further objects to this request on the grounds that it is vague and ambiguous because it
25 requires Softscape to speculate about the identity of SuccessFactors' "prospective customers" or
26 "employees."

27 Subject to the foregoing specific and general objections, Softscape will produce non-
28 privileged relevant, responsive documents in its possession, custody or control dated between

1 January 1, 2008 and the present that are reflected in or related to any facts or other information
2 contained in the PRESENTATION and/or all materials obtained from SUCCESSFACTORS'
3 website, online customer community, webinars, or online demonstration environments, or copies of
4 webpages or the content therein that is related to the PRESENTATION.

5 **REQUEST FOR PRODUCTION NO. 8:**

6 ALL DOCUMENTS CONCERNING or showing access from any SOFTSCAPE computer
7 to SUCCESSFACTORS's [sic] website, online customer community, or online demonstration
8 environments, including but not limited to DOCUMENTS CONCERNING web browser history
9 files, system logs, user names, passwords, user "ACE275," or any copy of a SUCCESSFACTOR
10 webpage or its contents.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

12 Softscape objects to this request to the extent it calls for the production of material protected
13 by attorney-client privilege or the attorney work product doctrine.

14 Subject to the foregoing specific and general objections, Softscape will produce non-
15 privileged relevant, responsive documents in its possession, custody or control dated between
16 January 1, 2008 and the present that are related to access from any SOFTSCAPE computer to
17 SUCCESSFACTORS' website, online customer community, or online demonstration environments,
18 including but not limited to documents relating to web browser history files, system logs, user
19 names, passwords, user "ACE275," or any copy of a SUCCESSFACTOR webpage or its contents
20 insofar as such access was related to the PRESENTATION.

21 **REQUEST FOR PRODUCTION NO. 9:**

22 ALL DOCUMENTS CONCERNING the user name "John Anonymous" or associated e-
23 mail address "hemknowledge2008a@gmail.com" to the extent that they mention the
24 PRESENTATION or SOFTSCAPE, SUCCESSFACTORS, or their products, services, employees,
25 business, or actual or prospective customers.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

27 Softscape objects to this request to the extent it calls for the production of material protected
28 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this

1 request on the grounds that it is vague and ambiguous because it requires Softscape to speculate
2 about the identity of SuccessFactors' "prospective customers" or "employees."

3 Subject to the foregoing specific and general objections, Softscape will produce non-
4 privileged relevant, responsive documents in its possession, custody or control that are related to the
5 user name "John Anonymous" or associated e-mail address "hemknowledge2008a@gmail.com" to
6 the extent that they mention the PRESENTATION or SOFTSCAPE, SUCCESSFACTORS, or their
7 products, services, employees, business, or actual or prospective customers.

8 **REQUEST FOR PRODUCTION NO. 10:**

9 A true and accurate bit for bit copy of the data storage media for any computer used by
10 David Watkins for work concerning SOFTSCAPE or SUCCESSFACTORS.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

12 Softscape objects to this request to the extent it calls for the production of material protected
13 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
14 request to the extent that it calls for confidential, proprietary information. Softscape further objects
15 to this request because it is overbroad as to both time and scope, rendering a response unduly
16 burdensome. The Complaint alleges that Softscape's purported unauthorized access of its online
17 demonstration environment occurred sometime after January 2008 and the distribution of the
18 PRESENTATION occurred on or about March 4, 2008. To the extent this request seeks documents
19 unrelated to the PRESENTATION or SuccessFactor's online demonstration environments, which
20 are the subject of this action, Softscape also objects.

21 Softscape further objects to this request to the extent it seeks documents or things that are
22 protected by privacy rights under the California, Massachusetts or United States Constitutions or
23 state or federal law, or by any other confidentiality protections. As Softscape has attested under
24 oath, it has made forensic copies of the computers known to have been used to create, modify or
25 revise the PRESENTATION, and has made forensic copies of the computers known to have
26 accessed SuccessFactor's online demonstration environments. There is no requirement under the
27 Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

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1 **REQUEST FOR PRODUCTION NO. 11:**

2 A true and accurate bit for bit copy of the data storage media for any computer used by
3 Dennis Martinek for work concerning SOFTSCAPE or SUCCESSFACTORS.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

5 Softscape objects to this request to the extent it calls for the production of material protected
6 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
7 request to the extent that it calls for confidential, proprietary information. Softscape further objects
8 to this request because it is overbroad as to both time and scope, rendering a response unduly
9 burdensome. The Complaint alleges that Softscape's purported unauthorized access of its online
10 demonstration environment occurred sometime after January 2008 and the distribution of the
11 PRESENTATION occurred on or about March 4, 2008. To the extent this request seeks documents
12 unrelated to the PRESENTATION or SuccessFactor's online demonstration environments, which
13 are the subject of this action, Softscape also objects.

14 Softscape further objects to this request to the extent it seeks documents or things that are
15 protected by privacy rights under the California, Massachusetts or United States Constitutions or
16 state or federal law, or by any other confidentiality protections. As Softscape has attested under
17 oath, it has made forensic copies of the computers known to have been used to create, modify or
18 revise the PRESENTATION, and has made forensic copies of the computers known to have
19 accessed SuccessFactor's online demonstration environments. There is no requirement under the
20 Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

21 **REQUEST FOR PRODUCTION NO. 12:**

22 A true and accurate bit for bit copy of the data storage for any computer that was involved in
23 the creation, modification, collection of information for, sharing, or e-mailing of the
24 PRESENTATION.

25 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

26 Softscape objects to this request to the extent it calls for the production of material protected
27 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
28 request to the extent that it calls for confidential, proprietary information. Softscape further objects

1 to this request because it is overbroad as to both time and scope, rendering a response unduly
2 burdensome. The Complaint alleges that Softscape's purported unauthorized access of its online
3 demonstration environment occurred sometime after January 2008 and the distribution of the
4 PRESENTATION occurred on or about March 4, 2008. To the extent this request seeks documents
5 unrelated to the PRESENTATION or SuccessFactor's online demonstration environments, which
6 are the subject of this action, Softscape also objects.

7 Softscape further objects to this request to the extent it seeks documents or things that are
8 protected by privacy rights under the California, Massachusetts or United States Constitutions or
9 state or federal law, or by any other confidentiality protections. As Softscape has attested under
10 oath, it has made forensic copies of the computers known to have been used to create, modify or
11 revise the PRESENTATION, and has made forensic copies of the computers known to have
12 accessed SuccessFactor's online demonstration environments. There is no requirement under the
13 Federal Rules of Civil Procedure that these forensic copies be turned over to SuccessFactors.

14 **REQUEST FOR PRODUCTION NO. 13:**

15 ALL DOCUMENTS CONCERNING contracts, licenses, or agreements, whether actual or
16 prospective, between SOFTSCAPE and any recipients of the PRESENTATION or any
17 SUCCESSFACTORS customers mentioned in the PRESENTATION.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

19 Softscape objects to this request to the extent it calls for the production of material protected
20 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
21 request to the extent that it calls for the production of third party confidential, proprietary
22 information. Softscape further objects to this request because it is overbroad as to both time and
23 scope, rendering a response unduly burdensome.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that constitute
26 contracts, licenses, or agreements with an effective date later than March 4, 2008 between
27 SOFTSCAPE and any recipients of the PRESENTATION or any SUCCESSFACTORS customers
28 mentioned in the PRESENTATION.

1 **REQUEST FOR PRODUCTION NO. 14:**

2 ALL DOCUMENTS CONCERNING the relationship of Javier Cruz, Ely Valls, or New
3 Millenium Shoe or New Millennium Shoe with David Watkins, SOFTSCAPE or
4 SUCCESSFACTORS, including but not limited to COMMUNICATIONS among any of them.

5 **RESPONSE FOR REQUEST FOR PRODUCTION NO. 14:**

6 Softscape objects to this request to the extent it calls for the production of material protected
7 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
8 request to the extent that it calls for third party confidential, proprietary information. Softscape
9 further objects to this request because it is overbroad as to both time and scope, rendering a
10 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
11 access of its online demonstration environment occurred sometime after January 2008 and the
12 distribution of the PRESENTATION occurred on or about March 4, 2008.

13 Subject to the foregoing specific and general objections, Softscape will produce non-
14 privileged relevant, responsive documents in its possession, custody or control that are related to the
15 relationship of Javier Cruz, Ely Valls, or New Millenium Shoe or New Millennium Shoe with
16 David Watkins or SOFTSCAPE related to the creation of the PRESENTATION.

17 **REQUEST FOR PRODUCTION NO. 15:**

18 ALL DOCUMENTS CONCERNING SOFTSCAPE's procurement, copying, or use of
19 SUCCESSFACTORS' TRADEMARKS or PowerPoint templates.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

21 Softscape objects to this request to the extent it calls for the production of material protected
22 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
23 request because it is overbroad as to both time and scope, rendering a response unduly burdensome.
24 The Complaint alleges that Softscape's purported unauthorized access of its online demonstration
25 environment occurred sometime after January 2008 and the distribution of the PRESENTATION
26 occurred on or about March 4, 2008.

27 Subject to the foregoing specific and general objections, Softscape will produce non-
28 privileged relevant, responsive documents in its possession, custody or control that are related to

1 SOFTSCAPE's procurement, copying, or use of SUCCESSFACTORS' TRADEMARKS or
2 PowerPoint templates in connection with the creation of the PRESENTATION.

3 **REQUEST FOR PRODUCTION NO. 16:**

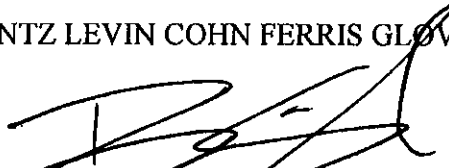
4 ALL DOCUMENTS reflecting articles of incorporation, bylaws, corporate registration, and
5 domain name registration for New Millenium Shoe.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

7 Softscape objects to this request to the extent it calls for the production of material protected
8 by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this
9 request to the extent that it calls for third party confidential, proprietary information. Softscape
10 further objects to this request to the extent it seeks documents that are outside the scope of a Rule 34
11 request to a party. This request seeks documents in the possession, custody and control of a third
12 party witness, which requires a subpoena directed to that witness under Rule 45.

13 Dated: May 14, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, PC

14
15 
16 By: BRYAN J. SINCLAIR

17 Attorneys for Defendant,
18 SOFTSCAPE, INC.
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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is 1400 Page Mill Road, Palo Alto, California 94304.

On May 14, 2008, I served true copies of the following document(s) described as **DEFENDANT SOFTSCAPE, INC.'S RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** on the interested parties in this action as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address akava@mintz.com to the person at the e-mail address listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mr. Patrick E. Premo
Fenwick & West LLP
801 California Street
Mountain View, CA 94041
E-Mail: ppremo@fenwick.com

Counsel for SuccessFactors

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 14, 2008, at Palo Alto, California.



Alice P. Kava

EXHIBIT 7

1 LAURENCE F. PULGRAM (CSB No. 115163)
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11 Telephone: (650) 988-8500
Facsimile: (650) 938-5200

12 Attorneys for Plaintiff SUCCESSFACTORS, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware
23 corporation,

24 Defendant.

Case No. CV 08-1376 CW

**PLAINTIFF'S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS AND
THINGS (Nos. 17 - 43)**

25 Pursuant to the Court's order permitting the parties to initiate discovery and Rules 26 and
26 34 of the Federal Rules of Civil Procedure, SuccessFactors requests that Defendant Softscape,
27 Inc. ("Softscape") respond in writing to each of the following Requests and produce the
28 documents and things requested for inspection and copying, in accordance with the definitions

and instructions set forth below, at the offices of Fenwick & West LLP, 555 California Street, Suite 1200, San Francisco, California 94104, within the time period permitted by the Federal Rules of Civil Procedure.

DEFINITIONS

1. The terms "YOU," "YOUR," "DEFENDANT," or "SOFTSCAPE" mean and include, collectively and/or individually, Softscape, Inc., and its parents, subsidiaries, affiliates, predecessors or successor companies, if any, and its current and former officers, directors, employees, consultants, attorneys, authorized agents, sales representatives, distributors, dealers, direct and indirect contractors, and/or all other PERSONS acting or purporting to act on its behalf.

2. The terms "PLAINTIFF" or "SUCCESSFACTORS" mean and include, collectively and/or individually, SuccessFactors, Inc., and its parents, subsidiaries, affiliates, corporate divisions, predecessors or successor companies, if any, and its current and former officers, directors, employees, consultants, attorneys, authorized agents, sales representatives, distributors, dealers, direct and indirect contractors, and/or all other PERSONS acting or purporting to act on its behalf.

3. The terms "PERSON" or "PERSONS" shall include both natural persons, corporate or other business entities, and all other forms of legal entities, and shall include, but is not limited to, the following: corporations, partnerships, joint ventures, associations, business organizations, trade organizations, standards organizations, and sole proprietorships.

4. The terms "DOCUMENT" or "DOCUMENTS" have the broadest meaning accorded that term by Fed. R. Civ. P. 34(a) and includes, but is not limited to, all of the items defined in Fed. R. Evid. 1001, and all preliminary and final drafts of any such item. The terms shall include, but not be limited to, all written, electronic, phonic, graphic, and recorded matter of every type and description and every tangible thing that is or has been in YOUR possession, custody, or control, to which YOU have access or of which YOU have knowledge. "DOCUMENT(S)" shall also include, but shall not be limited to, the following items, whether printed or recorded or reproduced by hand: agreements, contracts, leases, communications (including intra-company communications), electronic mail, data from Personal Digital Assistants

(including handheld computers, "smart phones," such as the palmOne™ Treo© and other similar devices and pagers), correspondence, postings on intranet or internet forums or websites (such as web pages and web logs or blogs), faxes, telegrams, cables, telexes, teletype messages, memoranda, records, books, diaries, notebooks calendars (paper, electronic and otherwise), telephone and other logs, telephone and other bills, voicemail and transcriptions thereof, recorded distributions, forecasts, statistical statements, accounts, invoices, purchase orders, receipts, billing records, tapes, expense vouchers, minutes, summaries and other records of meetings, conferences, negotiations, conversations, investigations and interviews, sales brochures and literature, advertisements, price lists, trade letters, press releases, stenographic, handwritten and any other notes, projections, working papers, checks (front and back), check stubs and receipts, models, surveys, devices, pictures, photographs, films, computer records, data compilations, and voice and video recordings. "DOCUMENT(S)" shall not be limited in any way as to the form of storage (such as paper, microfiche, magnetic tape, magnetic disk, CD-ROM, DVD, optical disk, flash memory drive, or other storage device). A draft or non-identical copy is a separate document within the meaning of this term.

5. The terms "COMMUNICATION" or "COMMUNICATIONS" refer to any exchange of information by any means of transmission and the sending or receipt of information of any kind by or through any means, including but not limited to speech, writings, documents, language (machine, foreign or otherwise) of any kind, computer electronics or electronic data, sound, radio or video signals, telecommunications, telephone, teletype, facsimile, telegram, microfilm, microfiche, photographic film of all types or other media of any kind. The terms "COMMUNICATION" and "COMMUNICATIONS" also include, without limitation, all meetings, notices, requests, response, demands, complaints, press, publicity or trade releases, and postings on intranet or internet forums or websites (such as web pages and web logs or blogs).

6. "PRESENTATION" means the document shown as Exhibit 1 to the Declaration of Robert Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, including all components, formats, versions, portions, notes, and version data thereof.

7. SUCCESSFACTORS' TRADEMARKS means the name SUCCESSFACTORS and the logos registered with the United States Patent and Trademark Office with Serial Numbers 78660874, 78946750, 78706535, and 77248286.

8. The term "CONCERNING" means pertaining to, mentioning, commenting, describing, analyzing, dealing with, resulting from, constituting, including, comprising, consisting of, containing, referring to, reflecting, discussing, showing, stating, explaining, contradicting, providing context to, evidencing, concerning, or recording a particular subject in whole or in part, either directly or indirectly, or being in any way logically or factually connected with the matter discussed or identified.

9. The terms "or" and "and" shall be read in the conjunctive and in the disjunctive wherever they appear, and neither of these words shall be interpreted to limit the scope of these Requests.

10. The words "any," "all," and "each" shall be construed as "all and each."

11. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

12. The singular form of any word shall be deemed to include the plural. The plural form of any word shall be deemed to include the singular.

INSTRUCTIONS

1. In responding to the following requests, furnish all available DOCUMENTS, including documents in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators or division affiliates, partnerships, parents or subsidiaries, and persons under your control, not merely documents in your direct possession.

2. All DOCUMENTS shall be organized and produced pursuant to Rule 34(b) of the Federal Rules of Civil Procedure.

3. Electronic records and computerized information must be produced in an intelligible format, together with a description of the system from which they were derived sufficient to permit

1 rendering the records and information intelligible. Electronic information must be produced in
2 native format.

3 4. If YOU are unable to comply with a demand for any DOCUMENT in full, YOU are
4 requested to specify, pursuant to Federal Rule of Civil Procedure 34, whether YOUR inability to
5 comply is because the DOCUMENT has never existed, has been destroyed, has been lost,
6 misplaced or stolen, and/or has never been, or is no longer in YOUR possession, custody or control.
7 The statement shall set forth the name and address of any PERSON or organization known or
8 believed by YOU to have possession, custody, or control of the DOCUMENT.

9 5. If any information requested is claimed to be privileged, immune from discovery or
10 otherwise not discoverable, YOU are requested to provide all information falling within the scope
11 of the document request which is discoverable, and for each item of information contained in a
12 document to which a claim of privilege is made, YOU must identify such document in a privilege
13 and/or redaction log pursuant to Federal Rule of Civil Procedure 26(b)(5), such identification to
14 include at least the following:

- 15 (1) the basis on which the privilege is claimed;
- 16 (2) the names and positions of the author of the document and all other persons
17 participating in the preparation of the document;
- 18 (3) the name and position of each individual or other person to whom the
19 document, or a copy thereof, was sent or otherwise disclosed;
- 20 (4) where not apparent, the relationship of the author, writer, sender, initiator,
21 addressee or any other recipient with each other;
- 22 (5) the date of creation or transmittal indicated on each document, or an
23 estimate of that date, indicated as such, if no date appears on the document;
- 24 (6) a description of any accompanying material transmitted with or attached to
25 such document;
- 26 (7) the number of pages in such document;
- 27 (8) the particular document request to which such document is responsive; and

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(9) the general subject matter and whether any business or non-legal matter is contained or discussed in such document.

6. Each Request for DOCUMENTS seeks production of all DOCUMENTS described along with any attachments, drafts, and non-identical copies in any language whatsoever, in the possession, custody or control of YOU or YOUR respective agents or all available information, including such information as becomes available to YOU after YOUR answers hereto are served.

7. Unless otherwise specified, each Request for DOCUMENTS seeks production of all DOCUMENTS created or modified on or after January 1, 2007.

DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 17:

ALL DOCUMENTS CONCERNING actual or planned press releases by SOFTSCAPE regarding this action, including but not limited to any version, portion, edits, memoranda, notes, e-mails, file histories, and metadata.

DOCUMENT REQUEST NO. 18:

ALL DOCUMENTS CONCERNING SOFTSCAPE's interviews or investigations about the PRESENTATION, its creation or development, or its actual or planned dissemination.

DOCUMENT REQUEST NO. 19:

DOCUMENTS sufficient to show a list of SOFTSCAPE's actual and prospective customers as of March 4, 2008.

DOCUMENT REQUEST NO. 20:

ALL DOCUMENTS CONCERNING COMMUNICATIONS from January 1, 2008 to present with any of the persons or entities reflected in the e-mail addresses shown in Exhibit B to the Declaration of Liwen Mah in Support of SuccessFactors' Motion for Administrative Relief to File Materials Recently Produced by Google Inc. (Docket No. 55).

DOCUMENT REQUEST NO. 21:

ALL COMMUNICATIONS from January 1, 2008 to present involving the e-mail address mwest@softscape.com with or regarding any actual or prospective customers of SOFTSCAPE.

DOCUMENT REQUEST NO. 22:

ALL COMMUNICATIONS from January 1, 2008 to present involving Dennis Martinek with or regarding any actual or prospective customers of SOFTSCAPE, including but not limited to e-mails involving the e-mail address, wildgracks@yahoo.com.

DOCUMENT REQUEST NO. 23:

ALL COMMUNICATIONS from January 1, 2008 to present involving Rick Vatcher with or regarding any actual or prospective customers of SOFTSCAPE.

DOCUMENT REQUEST NO. 24:

ALL COMMUNICATIONS from January 1, 2008 to present involving Dave Watkins with or regarding any actual or prospective customers of SOFTSCAPE.

DOCUMENT REQUEST NO. 25:

ALL COMMUNICATIONS from January 1, 2008 to present involving Susan Mohr with or regarding any actual or prospective customers of SOFTSCAPE.

DOCUMENT REQUEST NO. 26:

ALL COMMUNICATIONS from January 1, 2008 to present between SOFTSCAPE and wildgracks@yahoo.com.

DOCUMENT REQUEST NO. 27:

ALL COMMUNICATIONS from January 1, 2008 to present between SOFTSCAPE and William Hurly or William Hurley, including but not limited to COMMUNICATIONS involving williamhurly@hotmail.com.

DOCUMENT REQUEST NO. 28:

ALL DOCUMENTS CONCERNING recipients of any DOCUMENTS or information that SUCCESSFACTORS provided to New Millenium Shoe, Ely Valls, or Javier Cruz, including but not limited to the proposal that SUCCESSFACTORS prepared for New Millenium Shoe, which was attached as Exhibit 3 to the Declaration of Jorge Corrales in Support of Preliminary Injunction and Expedited Discovery (Dkt. No. 53).

DOCUMENT REQUEST NO. 29:

ALL DOCUMENTS CONCERNING commentary, discussion, or analysis of any DOCUMENTS or information that SUCCESSFACTORS provided to New Millenium Shoe, Ely Valls, or Javier Cruz, including but not limited to the proposal that SUCCESSFACTORS prepared for New Millenium Shoe.

DOCUMENT REQUEST NO. 30:

ALL DOCUMENTS CONCERNING access between SOFTSCAPE servers or computers and Courtyard Marriott or the IP address 74.94.170.178, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 31:

ALL DOCUMENTS CONCERNING the Courtyard Marriott in Waltham, Massachusetts, including but not limited to travel itineraries, accounts payable, billing records, expense reimbursements, calendar entries, and COMMUNICATIONS between SOFTSCAPE and Courtyard Marriott.

DOCUMENT REQUEST NO. 32:

All memoranda of understanding, licenses, proposals, communications setting forth proposals or orders, invoices, or purchase orders between SOFTSCAPE and its actual or prospective customers after January 1, 2008.

DOCUMENT REQUEST NO. 33:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address 65.96.237.54, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 34:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address 65.96.233.62, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 35:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **62.140.137.160**, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 36:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **217.118.122.88**, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 37:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **82.108.171.66**, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 38:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **24.34.56.79**, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 39:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **98.216.168.122**, including but not limited to COMMUNICATIONS between the same.

DOCUMENT REQUEST NO. 40:

DOCUMENTS sufficient to identify the persons who receive e-mails sent to sales@softscape.com on March 4, 2008.

DOCUMENT REQUEST NO. 41:

ALL DOCUMENTS CONCERNING changes to the www.newmilleniumshoe.com website in or after November 2007, including but not limited to COMMUNICATIONS involving Dave Watkins or SOFTSCAPE regarding the website.

DOCUMENT REQUEST NO. 42:

ALL COMMUNICATIONS between vallsely@hotmail.com, on the one hand, and Dave Watkins or SOFTSCAPE, on the other hand, from January 1, 2007 to present.

DOCUMENT REQUEST NO. 43:

DOCUMENTS supporting YOUR claim that “the Presentation was intended for Softscape’s internal use only” and “was marked and saved electronically on the company’s server, and this treatment of the Presentation was repeatedly emphasized to the Softscape sales force both orally and in writing,” as set forth in Paragraph 8 of the Declaration of David Watkins In Opposition to Plaintiff’s Motion to Strike and in Response to Order to Show Cause dated 03.26.08 (“Watkins Decl.”).

Dated: April 4, 2008

FENWICK & WEST LLP

By: 

Patrick E. Premo

Attorneys for Plaintiff SUCCESSFACTORS, INC.

1283327

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 8

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6 E-mail: jpatchen@tcolaw.com

7 Attorneys for Defendant SOFTSCAPE, INC.

8

9

UNITED STATES DISTRICT COURT

10

NORTHERN DISTRICT OF CALIFORNIA

11

OAKLAND DIVISION

12

13 SUCCESSFACTORS, INC.,

Case No.: C-08-1376 (CW)

14 Plaintiff,

15 v.

**DEFENDANT SOFTSCAPE, INC.'S
RESPONSE TO PLAINTIFF'S SECOND
SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS**

16 SOFTSCAPE, INC.,

17 Defendant.

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1 PROPOUNDING PARTY: Plaintiff SUCCESSFACTORS, INC.

2 RESPONDING PARTY: Defendant SOFTSCAPE, INC.

3 SET NO.: Two (2)

4 Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant
5 SOFTSCAPE, INC. ("Softscape") hereby responds to the Second Set Requests for Production of
6 Documents ("Requests") served by Plaintiff SUCCESSFACTORS, INC. ("SuccessFactors"), as
7 follows:

8 **GENERAL OBJECTIONS TO REQUESTS FOR PRODUCTION**

9 The following general objections apply to each separately numbered document request
10 contained in these requests, and are incorporated by this reference, to the extent applicable, into
11 each specific response, as if set forth in full.

12 1. Softscape objects to each request to the extent it purports to seek the production of
13 documents that are protected by the attorney-client privilege, work product doctrine, common
14 interest privilege, and/or any other applicable privilege. The inadvertent production of any
15 privileged document is not to be deemed a waiver of privilege, and Softscape reserves the right to
16 object to the introduction or any other use of any privileged or protected documents that may be
17 inadvertently produced. Any agreement to produce documents responsive to a request is not an
18 acknowledgment that any such documents exist.

19 2. Softscape objects to each request to the extent it purports to seek the production of
20 documents that are protected by privacy rights under the California or United States Constitutions
21 or state or federal law, or by any other confidentiality protections.

22 3. Softscape objects to each request to the extent it seeks documents outside of
23 Softscape's possession, custody or control.

24 4. Softscape objects to each request to the extent it purports to seek the production of
25 documents that are not relevant to the subject matter of the underlying action, and not reasonably
26 calculated to lead to discovery of admissible evidence.

27 5. Softscape objects to each request as overbroad, unduly burdensome, not relevant to
28 the subject matter of the underlying action, and not reasonably calculated to lead to discovery of

1 admissible evidence, to the extent the request seeks production of documents that were created
2 before January 1, 2008, the first date of factual allegations against Softscape.

3 6. Softscape objects to these requests to the extent they seek to have Softscape furnish
4 information and identify documents that are a matter of the public record, and therefore, are
5 equally available to the propounding party as they are to Softscape.

6 7. Softscape objects to these requests to the extent they seek to have Softscape furnish
7 information and identify documents that are proprietary to Softscape and contain confidential or
8 trade secret information.

9 8. Softscape objects to these requests to the extent they purport to impose on
10 Softscape obligations or responsibilities in excess of those imposed by the Federal Rules of Civil
11 Procedure, the applicable Local Rules of this Court, any other applicable rules, case law, statutes
12 governing the proper scope of discovery, or applicable Court orders.

13 9. The definition of "PRESENTATION" as used in these requests is overbroad,
14 compound, and unduly burdensome. In responding to these requests, Softscape will interpret the
15 term "PRESENTATION" to mean the document attached as Exhibit 1 to the Declaration of Robert
16 Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary Restraining Order and
17 Order to Show Cause re Preliminary Injunction, filed March 11, 2008, bearing control numbers
18 SF00000001-SF00000043.

19 10. At this early stage, Softscape has not completed its investigation of facts, witnesses
20 or documents relating to this case; has not completed discovery in this action; has not completed
21 its analysis of available data; and has not completed its preparations for the preliminary injunction
22 hearing. Thus, although a good faith effort has been made to conduct a diligent search and to
23 supply pertinent documents when they have been requested, and a reasonable inquiry has been
24 made in an effort to comply with these requests, it has not been possible in some instances to make
25 unqualified responses. Further, the responses are necessarily made without prejudice to
26 Softscape's rights to produce evidence of any subsequently discovered facts, witnesses or
27 documents. Softscape provides its responses based on its understanding of the claims as set forth
28

1 in the pleadings currently on file in this case, as of the date these responses are made, and has
2 furnished such information as is presently available to it.

3 **RESPONSES TO REQUEST FOR PRODUCTION**

4 **REQUEST FOR PRODUCTION NO. 17:**

5 ALL DOCUMENTS CONCERNING actual or planned press releases by SOFTSCAPE
6 regarding this action, including but not limited to any version, portion, edits, memoranda, notes, e-
7 mails, file histories, and metadata.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

9 Softscape objects to this request to the extent it calls for the production of material
10 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
11 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
12 also objects to this request on the grounds that it is not reasonably calculated to lead to the
13 discovery of admissible evidence. Softscape further objects to this request because it is overbroad
14 as to both time and scope, rendering a response unduly burdensome. To the extent this request
15 seeks documents unrelated to the PRESENTATION or SuccessFactors' online demonstration
16 environments, which are the subject of this action, Softscape also objects. To the extent that this
17 requests seeks documents that are available to the public, the requested documents are equally
18 available to SuccessFactors.

19 **REQUEST FOR PRODUCTION NO. 18:**

20 ALL DOCUMENTS CONCERNING SOFTSCAPE's interviews or investigations about
21 the PRESENTATION, its creation or development, or its actual or planned dissemination.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

23 Softscape objects to this request to the extent it calls for the production of material
24 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
25 objects to this request to the extent that it calls for confidential, proprietary information.

26 Subject to the foregoing specific and general objections, Softscape will produce non-
27 privileged relevant, responsive documents in its possession, custody or control that are related to
28 the creation, modification and dissemination of the PRESENTATION.

1 **REQUEST FOR PRODUCTION NO. 19:**

2 DOCUMENTS sufficient to show a list of SOFTSCAPE's actual and prospective
3 customers as of March 4, 2008.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 19:**

5 Softscape objects to this request to the extent it calls for the production of material
6 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
7 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
8 also objects to this request on the grounds that it is not reasonably calculated to lead to the
9 discovery of admissible evidence. Softscape further objects to this request because it is overbroad
10 as to both time and scope, rendering a response unduly burdensome. To the extent this request
11 seeks documents unrelated to the PRESENTATION or SuccessFactors' online demonstration
12 environments, which are the subject of this action, Softscape also objects.

13 **REQUEST FOR PRODUCTION NO. 20:**

14 ALL DOCUMENTS CONCERNING COMMUNICATIONS from January 1, 2008 to
15 present with any of the persons or entities reflected in the e-mail addresses shown in Exhibit B to
16 the Declaration of Liwen Mah in Support of SuccessFactors' Motion for Administrative Relief to
17 File Materials Recently Produced by Google Inc. (Docket No. 55).

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

19 Softscape objects to this request to the extent it calls for the production of material
20 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
21 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
22 also objects to this request on the grounds that it is not reasonably calculated to lead to the
23 discovery of admissible evidence. Softscape further objects to this request because it is overbroad
24 as to both time and scope, rendering a response unduly burdensome. To the extent this request
25 seeks documents unrelated to the PRESENTATION or SuccessFactors' online demonstration
26 environments, which are the subject of this action, Softscape also objects.

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1 **REQUEST FOR PRODUCTION NO. 21:**

2 ALL COMMUNICATIONS from January 1, 2008 to present involving the e-mail address
3 mwest@softscape.com with or regarding any actual or prospective customers of SOFTSCAPE.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 21:**

5 Softscape objects to this request to the extent it calls for the production of material
6 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
7 objects to this request to the extent that it calls for confidential, proprietary information. To the
8 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

9 Subject to the foregoing specific and general objections, Softscape will produce non-
10 privileged relevant, responsive documents in its possession, custody or control that are related to
11 the creation, modification and dissemination of the PRESENTATION.

12 **REQUEST FOR PRODUCTION NO. 22:**

13 ALL COMMUNICATIONS from January 1, 2008 to present involving Dennis Martinek
14 with or regarding any actual or prospective customers of SOFTSCAPE, including but not limited
15 to e-mails involving the e-mail address, wildgracks@yahoo.com.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 22:**

17 Softscape objects to this request to the extent it calls for the production of material
18 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
19 objects to this request to the extent that it calls for confidential, proprietary information. To the
20 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

21 Subject to the foregoing specific and general objections, Softscape will produce non-
22 privileged relevant, responsive documents in its possession, custody or control that are related to
23 the creation, modification and dissemination of the PRESENTATION.

24 **REQUEST FOR PRODUCTION NO. 23:**

25 ALL COMMUNICATIONS from January 1, 2008 to present involving Rick Vatcher with
26 or regarding any actual or prospective customers of SOFTSCAPE.

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1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 23:**

2 Softscape objects to this request to the extent it calls for the production of material
3 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
4 objects to this request to the extent that it calls for confidential, proprietary information. To the
5 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

6 Subject to the foregoing specific and general objections, Softscape will produce non-
7 privileged relevant, responsive documents in its possession, custody or control that are related to
8 the creation, modification and dissemination of the PRESENTATION.

9 **REQUEST FOR PRODUCTION NO. 24:**

10 ALL COMMUNICATIONS from January 1, 2008 to present involving Dave Watkins with
11 or regarding any actual or prospective customers of SOFTSCAPE.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

13 Softscape objects to this request to the extent it calls for the production of material
14 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
15 objects to this request to the extent that it calls for confidential, proprietary information. To the
16 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

17 Subject to the foregoing specific and general objections, Softscape will produce non-
18 privileged relevant, responsive documents in its possession, custody or control that are related to
19 the creation, modification and dissemination of the PRESENTATION.

20 **REQUEST FOR PRODUCTION NO. 25:**

21 ALL COMMUNICATIONS from January 1, 2008 to present involving Susan Mohr with
22 or regarding any actual or prospective customers of SOFTSCAPE.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

24 Softscape objects to this request to the extent it calls for the production of material
25 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
26 objects to this request to the extent that it calls for confidential, proprietary information. To the
27 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

28 Subject to the foregoing specific and general objections, Softscape will produce non-

1 privileged relevant, responsive documents in its possession, custody or control that are related to
2 the creation, modification and dissemination of the PRESENTATION.

3 **REQUEST FOR PRODUCTION NO. 26:**

4 ALL COMMUNICATIONS from January 1, 2008 to present between SOFTSCAPE and
5 wildgracks@yahoo.com.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

7 Softscape objects to this request to the extent it calls for the production of material
8 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
9 objects to this request to the extent that it calls for confidential, proprietary information. To the
10 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

11 Subject to the foregoing specific and general objections, Softscape will produce non-
12 privileged relevant, responsive documents in its possession, custody or control that are related to
13 the creation, modification and dissemination of the PRESENTATION.

14 **REQUEST FOR PRODUCTION NO. 27:**

15 ALL COMMUNICATION from January 1, 2008 to present between SOFTSCAPE and
16 William Hurly or William Hurley, including but not limited to COMMUNICATIONS involving
17 williamhurly@hotmail.com.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 27:**

19 Softscape objects to this request to the extent it calls for the production of material
20 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
21 objects to this request to the extent that it calls for confidential, proprietary information. To the
22 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

23 Subject to the foregoing specific and general objections, Softscape will produce non-
24 privileged relevant, responsive documents in its possession, custody or control that are related to
25 the creation, modification and dissemination of the PRESENTATION.

26 **REQUEST FOR PRODUCTION NO. 28:**

27 ALL DOCUMENTS CONCERNING recipients of any DOCUMENTS or information that
28 SUCCESSFACTORS provided to New Millenium Shoe, Ely Valls, or Javier Cruz, including but

1 not limited to the proposal that SUCCESSFACTORS prepared for New Millenium Shoe, which
2 was attached as Exhibit 3 to the Declaration of Jorge Corrales in Support of Preliminary Injunction
3 and Expedited Discovery (Dkt. No. 53).

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 28:**

5 Softscape objects to this request to the extent it calls for the production of material
6 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
7 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
8 further objects to this request because it is overbroad as to both time and scope, rendering a
9 response unduly burdensome. To the extent this request seeks documents unrelated to the
10 PRESENTATION or SuccessFactors' online demonstration environments, which are the subject
11 of this action, Softscape also objects.

12 Subject to the foregoing specific and general objections, Softscape will produce non-
13 privileged relevant, responsive documents in its possession, custody or control that are related to
14 SuccessFactors' online demonstration environment.

15 **REQUEST FOR PRODUCTION NO. 29:**

16 ALL DOCUMENTS CONCERNING commentary, discussion, or analysis of any
17 DOCUMENTS or information that SUCCESSFACTORS provided to New Millenium Shoe, Ely
18 Valls, or Javier Cruz, including but not limited to the proposal that SUCCESSFACTORS prepared
19 for New Millenium Shoe.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 29:**

21 Softscape objects to this request to the extent it calls for the production of material
22 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
23 objects to this request to the extent that it calls for confidential, proprietary information.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that are related to
26 SuccessFactors' online demonstration environment.

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1 **REQUEST FOR PRODUCTION NO. 30:**

2 ALL DOCUMENTS CONCERNING access between SOFTSCAPE servers or computers
3 and Courtyard Marriott or the IP address 74.94.170.178, including but not limited to
4 COMMUNICATIONS between the same.

5 **RESPONSE FOR REQUEST FOR PRODUCTION NO. 30:**

6 Softscape objects to this request to the extent it calls for the production of material
7 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
8 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
9 further objects to this request because it is overbroad as to both time and scope, rendering a
10 response unduly burdensome. To the extent this request seeks documents unrelated to the
11 PRESENTATION or SuccessFactors' online demonstration environments, which are the subject
12 of this action, Softscape also objects. To the extent that this request seeks documents that are
13 equally available to and already in SuccessFactors' possession by way of its third party subpoena
14 to the Courtyard Marriott in Waltham, Massachusetts, Softscape also objects.

15 Subject to the foregoing specific and general objections, Softscape will produce non-
16 privileged relevant, responsive documents in its possession, custody or control concerning access
17 between Softscape IP addresses and the Courtyard Marriott in Waltham, Massachusetts, or IP
18 address 74.94.170.178, on March 4, 2008.

19 **REQUEST FOR PRODUCTION NO. 31:**

20 ALL DOCUMENTS CONCERNING the Courtyard Marriott in Waltham, Massachusetts,
21 including but not limited to travel itineraries, accounts payable, billing records, expense
22 reimbursements, calendar entries, and COMMUNICATIONS between SOFTSCAPE and
23 Courtyard Marriott.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 31:**

25 Softscape objects to this request to the extent it calls for the production of material
26 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
27 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
28 further objects to this request because it is overbroad as to both time and scope, rendering a

1 response unduly burdensome. To the extent this request seeks documents unrelated to the
2 PRESENTATION or SuccessFactors' online demonstration environments, which are the subject
3 of this action, Softscape also objects. To the extent that this requests seeks documents that are
4 equally available to and already in SuccessFactors' possession by way of its third party subpoena
5 to the Courtyard Marriott in Waltham, Massachusetts, Softscape also objects.

6 Subject to the foregoing specific and general objections, Softscape will produce non-
7 privileged relevant, responsive documents in its possession, custody or control concerning
8 communications between Softscape IP addresses and the Courtyard Marriott in Waltham,
9 Massachusetts, including travel itineraries, accounts payable, billing records, expense
10 reimbursements and calendar entries referencing or indicating contact with the Courtyard Marriott
11 in Waltham, Massachusetts during the period March 3 - 4, 2008.

12 **REQUEST FOR PRODUCTION NO. 32:**

13 All memoranda of understanding, licenses, proposals, communications setting forth
14 proposals or orders, invoices, or purchase orders between SOFTSCAPE and its actual or
15 prospective customers after January 1, 2008.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 32:**

17 Softscape objects to this request to the extent it calls for the production of material
18 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
19 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
20 also objects to this request on the grounds that it is not reasonably calculated to lead to the
21 discovery of admissible evidence. Softscape further objects to this request because it is overbroad
22 as to both time and scope, rendering a response unduly burdensome. To the extent this request
23 seeks documents unrelated to the PRESENTATION or SuccessFactors' online demonstration
24 environments, which are the subject of this action, Softscape also objects.

25 **REQUEST FOR PRODUCTION NO. 33:**

26 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from
27 the IP address 65.96.237.54, including but not limited to COMMUNICATIONS between the
28 same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 33:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a response unduly burdensome. Softscape further objects to this requests as irrelevant, rendering a response unduly burdensome. To the extent this request seeks all internet communications between Softscape and the home of Softscape's CEO, Softscape also objects. To the extent that this requests seeks documents that are equally available to and already in SuccessFactors' possession by way of its third party subpoena to Comcast, Softscape also objects.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 69.96.237.54 on March 3 and 4, 2008, to the extent such records exist.

REQUEST FOR PRODUCTION NO. 34:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address 65.96.233.62, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 34:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a response unduly burdensome. To the extent this request seeks all internet communications between Softscape and the home of Softscape's CEO, the request is grossly overbroad and irrelevant. To the extent that this requests seeks documents that are equally available to and already in SuccessFactors' possession by way of its third party subpoena to Comcast, Softscape also objects.

1 Subject to the foregoing specific and general objections, Softscape will produce non-
 2 privileged relevant, responsive documents in its possession, custody or control concerning access
 3 between Softscape IP addresses and the IP address 69.96.233.62 on March 3 and 4, 2008, to the
 4 extent such records exist.

5 **REQUEST FOR PRODUCTION NO. 35:**

6 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from
 7 the IP address 62.140.137.160, including but not limited to COMMUNICATIONS between the
 8 same.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 35:**

10 Softscape objects to this request to the extent it calls for the production of material
 11 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
 12 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
 13 further objects to this request because it is overbroad as to both time and scope, rendering a
 14 response unduly burdensome. To the extent this request seeks all internet communications
 15 between Softscape and an internet address or mobile device in the United Kingdom, the request is
 16 grossly overbroad and irrelevant.

17 Subject to the foregoing specific and general objections, Softscape will produce non-
 18 privileged relevant, responsive documents in its possession, custody or control concerning access
 19 between Softscape IP addresses and the IP address 62.140.137.160 on March 3 and 4, 2008, to the
 20 extent such records exist.

21 **REQUEST FOR PRODUCTION NO. 36:**

22 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from
 23 the IP address 217.118.122.88, including but not limited to COMMUNICATIONS between the
 24 same.

25 **RESPONSE TO REQUEST FOR PRODUCTION NO. 36:**

26 Softscape objects to this request to the extent it calls for the production of material
 27 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
 28 objects to this request to the extent that it calls for confidential, proprietary information. Softscape

1 further objects to this request because it is overbroad as to both time and scope, rendering a
2 response unduly burdensome. To the extent this request seeks all internet communications
3 between Softscape and a local IP service in London, England, the request is grossly overbroad and
4 irrelevant.

5 Subject to the foregoing specific and general objections, Softscape will produce non-
6 privileged relevant, responsive documents in its possession, custody or control concerning access
7 between Softscape IP addresses and the IP address 217.118.122.88 on March 3 and 4, 2008, to the
8 extent such records exist.

9 **REQUEST FOR PRODUCTION NO. 37:**

10 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from
11 the IP address 82.108.171.66, including but not limited to COMMUNICATIONS between the
12 same.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 37:**

14 Softscape objects to this request to the extent it calls for the production of material
15 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
16 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
17 further objects to this request because it is overbroad as to both time and scope, rendering a
18 response unduly burdensome. To the extent this request seeks all internet communications
19 between Softscape's London office and its Massachusetts headquarters, the request is grossly
20 overbroad and irrelevant.

21 Subject to the foregoing specific and general objections, Softscape will produce non-
22 privileged relevant, responsive documents in its possession, custody or control concerning access
23 between Softscape IP addresses and the IP address 82.108.171.66 on March 3 and 4, 2008, to the
24 extent such records exist.

25 **REQUEST FOR PRODUCTION NO. 38:**

26 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from
27 the IP address 24.34.56.79, including but not limited to COMMUNICATIONS between the same.

28

RESPONSE TO REQUEST FOR PRODUCTION NO. 38:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a response unduly burdensome. To the extent this request seeks all internet communications between Softscape and the home of Softscape's Chief Technology Officer, the request is grossly overbroad and irrelevant. To the extent that this requests seeks documents that are equally available to and already in SuccessFactors' possession by way of its third party subpoena to Comcast, Softscape also objects.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 24.34.56.79 on March 3 and 4, 2008, to the extent such records exist.

REQUEST FOR PRODUCTION NO. 39:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address 98.216.168.122, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape further objects to this request because it is overbroad as to both time and scope, rendering a response unduly burdensome. To the extent this request seeks all internet communications between Softscape and the home of Softscape's CEO, the request is grossly overbroad and irrelevant. To the extent that this requests seeks documents that are equally available to and already in SuccessFactors' possession by way of its third party subpoena to Comcast, Softscape also objects.

1 Subject to the foregoing specific and general objections, Softscape will produce non-
2 privileged relevant, responsive documents in its possession, custody or control concerning access
3 between Softscape IP addresses and the IP address 98.216.168.122 on March 3 and 4, 2008, to the
4 extent such records exist.

5 **REQUEST FOR PRODUCTION NO. 40:**

6 DOCUMENTS sufficient to identify the persons who receive e-mails sent to
7 sales@softscape.com on March 4, 2008.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 40:**

9 Softscape objects to this request to the extent it calls for the production of material
10 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
11 objects to this request to the extent that it calls for confidential, proprietary information. To the
12 extent this request seeks documents unrelated to the PRESENTATION, Softscape also objects.

13 Subject to the foregoing specific and general objections, Softscape will produce non-
14 privileged relevant, responsive documents in its possession, custody or control.

15 **REQUEST FOR PRODUCTION NO. 41:**

16 ALL DOCUMENTS CONCERNING changes to the www.newmilleniumshoe.com
17 website in or after November 2007, including but not limited to COMMUNICATIONS involving
18 Dave Watkins or SOFTSCAPE regarding the website.

19 **RESPONSE TO REQUEST FOR PRODUCTION NO. 41:**

20 Softscape objects to this request to the extent it calls for the production of material
21 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
22 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
23 further objects to this request because it is overbroad as to both time and scope, rendering a
24 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
25 access of its online demonstration environment occurred sometime after January 2008 and the
26 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
27 request seeks documents unrelated to the PRESENTATION or SuccessFactors' online
28 demonstration environments, which are the subject of this action, Softscape also objects.

1 Softscape further objects to this request to the extent it seeks documents that are outside the scope
2 of a Rule 34 request to a party. This request seeks documents in the possession, custody and
3 control of a third party witness, which requires a subpoena directed to that witness under Rule 45.

4 **REQUEST FOR PRODUCTION NO. 42:**

5 ALL COMMUNICATIONS between vallsely@hotmail.com, on the one hand, and Dave
6 Watkins or SOFTSCAPE, on the other hand, from January 1, 2007 to present.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 42:**

8 Softscape objects to this request to the extent it calls for the production of material
9 protected by attorney-client privilege or the attorney work product doctrine. Softscape further
10 objects to this request to the extent that it calls for confidential, proprietary information. Softscape
11 further objects to this request because it is overbroad as to both time and scope, rendering a
12 response unduly burdensome. The Complaint alleges that Softscape's purported unauthorized
13 access of its online demonstration environment occurred sometime after January 2008 and the
14 distribution of the PRESENTATION occurred on or about March 4, 2008. To the extent this
15 request seeks documents unrelated to the PRESENTATION or SuccessFactors' online
16 demonstration environments, which are the subject of this action, Softscape also objects.

17 Subject to the foregoing specific and general objections, Softscape will produce non-
18 privileged relevant, responsive documents in its possession, custody or control that are related to
19 the creation, modification and dissemination of the PRESENTATION, and SuccessFactors' online
20 demonstration environments.

21 **REQUEST FOR PRODUCTION NO. 43:**

22 DOCUMENTS supporting YOUR claim that "the Presentation was intended for
23 Softscape's internal use only" and "was marked and saved electronically on the company's server,
24 and this treatment of the Presentation was repeatedly emphasized to the Softscape sales force both
25 orally and in writing," as set forth in Paragraph 8 of the Declaration of David Watkins In
26 Opposition to Plaintiff's Motion to Strike and in Response to Order to Show Cause dated 03.26.08
27 ("Watkins Decl.").
28

RESPONSE TO REQUEST FOR PRODUCTION NO. 43:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control that are related to the creation, modification and dissemination of the PRESENTATION, and SuccessFactors' online demonstration environments.

Dated: May 5, 2008

TAYLOR & COMPANY LAW OFFICES, LLP

By: 

Jessica L. Grant

Attorneys for Defendant SOFTSCAPE, INC.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is One Ferry Building, Suite 355, San Francisco, California 94111.

On May 5, 2008, I served true copies of the following document(s) described as **DEFENDANT SOFTSCAPE, INC.'S RESPONSE TO PLAINTIFF'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** on the interested parties in this action as follows:

Mr. Laurence F. Pulgram
Fenwick & West LLP
555 California Street, 12th Floor
San Francisco, CA 94104

- ☐ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Taylor & Company's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☐ **BY FAX TRANSMISSION:** I faxed a copy of the document(s) to the persons at the fax numbers listed above. The telephone number of the sending facsimile machine was (415) 788-8208. No error was reported by the fax machine that I used.
- ☐ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address jlim@tcolaw.com to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.
- ☒ **BY PERSONAL SERVICE:** I personally delivered the document(s) to the person being at the addresses listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

1 ☐ **BY PERSONAL SERVICE:** I personally delivered the document(s) directly to the
2 person(s) being served.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct.

5 Executed on May 5, 2008, at San Francisco, California.


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7 Steven D. Day
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EXHIBIT 9

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Attorneys for Defendant,
SOFTSCAPE, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUCCESSFACTORS, INC, a Delaware
corporation,

Plaintiff,

vs.

SOFTSCAPE, INC., a Delaware corporation,
and DOES 1-10, inclusive,

Defendants.

Case No. CV 08-1376 CW (BZx)

**DEFENDANT SOFTSCAPE, INC.'S
AMENDED RESPONSES TO
PLAINTIFF'S SECOND SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS AND THINGS**

PROPOUNDING PARTY: Plaintiff SUCCESSFACTORS, INC.

RESPONDING PARTY: Defendant SOFTSCAPE, INC.

SET NO.: Two (2) - Amended Responses

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendant SOFTSCAPE, INC.
("Softscape") hereby responds to the Second Set Requests for Production of Documents
("Requests") served by Plaintiff SUCCESSFACTORS, INC. ("SuccessFactors"), as follows:

GENERAL OBJECTIONS TO REQUESTS FOR PRODUCTION

The following general objections apply to each separately numbered document request
contained in these requests, and are incorporated by this reference, to the extent applicable, into

1 each specific response, as if set forth in full.

2 1. Softscape objects to each request to the extent it purports to seek the production of
3 documents that are protected by the attorney-client privilege, work product doctrine, common
4 interest privilege, and/or any other applicable privilege. The inadvertent production of any
5 privileged document is not to be deemed a waiver of privilege, and Softscape reserves the right to
6 object to the introduction or any other use of any privileged or protected documents that may be
7 inadvertently produced. Any agreement to produce documents responsive to a request is not an
8 acknowledgment that any such documents exist.

9 2. Softscape objects to each request to the extent it purports to seek the production of
10 documents that are protected by privacy rights under the California or United States Constitutions
11 or state or federal law, or by any other confidentiality protections.

12 3. Softscape objects to each request to the extent it seeks documents outside of
13 Softscape's possession, custody or control.

14 4. Softscape objects to each request to the extent it purports to seek the production of
15 documents that are not relevant to the subject matter of the underlying action, and not reasonably
16 calculated to lead to discovery of admissible evidence.

17 5. Softscape objects to each request as overbroad, unduly burdensome, not relevant to
18 the subject matter of the underlying action, and not reasonably calculated to lead to discovery of
19 admissible evidence, to the extent the request seeks production of documents that were created
20 before January 1, 2008, the first date of factual allegations against Softscape.

21 6. Softscape objects to these requests to the extent they seek to have Softscape furnish
22 information and identify documents that are a matter of the public record, and therefore, are equally
23 available to the propounding party as they are to Softscape.

24 7. Softscape objects to these requests to the extent they seek to have Softscape furnish
25 information and identify documents that are proprietary to Softscape and contain confidential or
26 trade secret information.

27 8. Softscape objects to these requests to the extent they purport to impose on Softscape
28 obligations or responsibilities in excess of those imposed by the Federal Rules of Civil Procedure,

1 the applicable Local Rules of this Court, any other applicable rules, case law, statutes governing the
2 proper scope of discovery, or applicable Court orders.

3 9. The definition of "PRESENTATION" as used in these requests is overbroad,
4 compound, and unduly burdensome. In responding to these requests, Softscape will interpret the
5 term "PRESENTATION" to mean the document attached as Exhibit 1 to the Declaration of Robert
6 Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary Restraining Order and
7 Order to Show Cause re Preliminary Injunction, filed March 11, 2008, bearing control numbers
8 SF00000001-SF00000043.

9 10. At this early stage, Softscape has not completed its investigation of facts, witnesses
10 or documents relating to this case; has not completed discovery in this action; has not completed its
11 analysis of available data; and has not completed its preparations for the preliminary injunction
12 hearing. Thus, although a good faith effort has been made to conduct a diligent search and to
13 supply pertinent documents when they have been requested, and a reasonable inquiry has been
14 made in an effort to comply with these requests, it has not been possible in some instances to make
15 unqualified responses. Further, the responses are necessarily made without prejudice to Softscape's
16 rights to produce evidence of any subsequently discovered facts, witnesses or documents. Softscape
17 provides its responses based on its understanding of the claims as set forth in the pleadings currently
18 on file in this case, as of the date these responses are made, and has furnished such information as is
19 presently available to it.

20 **RESPONSES TO REQUEST FOR PRODUCTION**

21 **REQUEST FOR PRODUCTION NO. 17:**

22 ALL DOCUMENTS CONCERNING actual or planned press releases by SOFTSCAPE
23 regarding this action, including but not limited to any version, portion, edits, memoranda, notes, e-
24 mails, file histories, and metadata.

25 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

26 Softscape objects to this request to the extent it calls for the production of material protected
27 by attorney-client privilege or the attorney work product doctrine. Subject to the foregoing specific
28 and general objections, Softscape will produce non-privileged and/or non-work product relevant,

responsive documents in its possession, custody or control that contain actual or planned press releases by SOFTSCAPE regarding this action.

REQUEST FOR PRODUCTION NO. 18:

ALL DOCUMENTS CONCERNING SOFTSCAPE's interviews or investigations about the PRESENTATION, its creation or development, or its actual or planned dissemination.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged and/or non-work product relevant, responsive documents in its possession, custody or control that are related to interviews or investigations about the PRESENTATION, its creation or development, or its actual or planned dissemination.

REQUEST FOR PRODUCTION NO. 19:

DOCUMENTS sufficient to show a list of SOFTSCAPE's actual and prospective customers as of March 4, 2008.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape further objects to this request to the extent that it calls for confidential, proprietary information. Softscape also objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 20:

ALL DOCUMENTS CONCERNING COMMUNICATIONS from January 1, 2008 to present with any of the persons or entities reflected in the e-mail addresses shown in Exhibit B to the Declaration of Liwen Mah in Support of SuccessFactors' Motion for Administrative Relief to File Materials Recently Produced by Google Inc. (Docket No. 55).

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

Softscape objects to this request to the extent it calls for the production of material protected

1 by attorney-client privilege or the attorney work product doctrine. Due to the potential undue
2 burden of searching for, collecting, and reviewing a substantial amount of information that such a
3 search could reveal, Softscape will inquire as to the cost of performing such an extensive search and
4 meet and confer further on this Request No. 20.

5 **REQUEST FOR PRODUCTION NO. 21:**

6 ALL COMMUNICATIONS from January 1, 2008 to present involving the e-mail address
7 mwest@softscape.com with or regarding any actual or prospective customers of SOFTSCAPE.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 21:**

9 Softscape objects to this request to the extent it calls for the production of material protected
10 by attorney-client privilege or the attorney work product doctrine.

11 Subject to the foregoing specific and general objections, Softscape will produce non-
12 privileged relevant, responsive documents in its possession, custody or control that are
13 communications from January 1, 2008 to present involving the e-mail address
14 mwest@softscape.com with or regarding any actual or prospective customers of SOFTSCAPE
15 relating to the PRESENTATION or any facts contained or statements made in the
16 PRESENTATION.

17 **REQUEST FOR PRODUCTION NO. 22:**

18 ALL COMMUNICATIONS from January 1, 2008 to present involving Dennis Martinek
19 with or regarding any actual or prospective customers of SOFTSCAPE, including but not limited to
20 e-mails involving the e-mail address, wildgracks@yahoo.com.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 22:**

22 Softscape objects to this request to the extent it calls for the production of material protected
23 by attorney-client privilege or the attorney work product doctrine.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that are
26 communications from January 1, 2008 to present involving Dennis Martinek with or regarding any
27 actual or prospective customers of SOFTSCAPE relating to the PRESENTATION or any facts
28 contained or statements made in the PRESENTATION, including but not limited to e-mails

1 involving the e-mail address, wildgracks@yahoo.com.

2 **REQUEST FOR PRODUCTION NO. 23:**

3 ALL COMMUNICATIONS from January 1, 2008 to present involving Rick Vatcher with or
4 regarding any actual or prospective customers of SOFTSCAPE.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 23:**

6 Softscape objects to this request to the extent it calls for the production of material protected
7 by attorney-client privilege or the attorney work product doctrine.

8 Subject to the foregoing specific and general objections, Softscape will produce non-
9 privileged relevant, responsive documents in its possession, custody or control that are
10 communications from January 1, 2008 to present involving Rick Vatcher with or regarding any
11 actual or prospective customers of SOFTSCAPE relating to the PRESENTATION or any facts
12 contained or statements made in the PRESENTATION.

13 **REQUEST FOR PRODUCTION NO. 24:**

14 ALL COMMUNICATIONS from January 1, 2008 to present involving Dave Watkins with
15 or regarding any actual or prospective customers of SOFTSCAPE.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

17 Softscape objects to this request to the extent it calls for the production of material protected
18 by attorney-client privilege or the attorney work product doctrine.

19 Subject to the foregoing specific and general objections, Softscape will produce non-
20 privileged relevant, responsive documents in its possession, custody or control that are
21 communications from January 1, 2008 to present involving Dave Watkins with or regarding any
22 actual or prospective customers of SOFTSCAPE relating to the PRESENTATION or any facts
23 contained or statements made in the PRESENTATION.

24 **REQUEST FOR PRODUCTION NO. 25:**

25 ALL COMMUNICATIONS from January 1, 2008 to present involving Susan Mohr with or
26 regarding any actual or prospective customers of SOFTSCAPE.

27 **RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

28 Softscape objects to this request to the extent it calls for the production of material protected

1 by attorney-client privilege or the attorney work product doctrine.

2 Subject to the foregoing specific and general objections, Softscape will produce non-
3 privileged relevant, responsive documents in its possession, custody or control that are
4 communications from January 1, 2008 to present involving Susan Mohr with or regarding any
5 actual or prospective customers of SOFTSCAPE relating to the PRESENTATION or any facts
6 contained or statements made in the PRESENTATION.

7 **REQUEST FOR PRODUCTION NO. 26:**

8 ALL COMMUNICATIONS from January 1, 2008 to present between SOFTSCAPE and
9 wildgracks@yahoo.com.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

11 Softscape objects to this request to the extent it calls for the production of material protected
12 by attorney-client privilege or the attorney work product doctrine.

13 Subject to the foregoing specific and general objections, Softscape will produce non-
14 privileged relevant, responsive documents in its possession, custody or control that are
15 communications from January 1, 2008 to present between wildgracks@yahoo.com relating to the
16 PRESENTATION or any facts contained or statements made in the PRESENTATION.

17 **REQUEST FOR PRODUCTION NO. 27:**

18 ALL COMMUNICATION from January 1, 2008 to present between SOFTSCAPE and
19 William Hurly or William Hurley, including but not limited to COMMUNICATIONS involving
20 williamhurly@hotmail.com.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 27:**

22 Softscape objects to this request to the extent it calls for the production of material protected
23 by attorney-client privilege or the attorney work product doctrine.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that are
26 communications from January 1, 2008 to present between SOFTSCAPE and William Hurly or
27 William Hurley, including but not limited to COMMUNICATIONS involving
28 williamhurly@hotmail.com relating to the PRESENTATION or any facts contained or statements

1 made in the PRESENTATION.

2 **REQUEST FOR PRODUCTION NO. 28:**

3 ALL DOCUMENTS CONCERNING recipients of any DOCUMENTS or information that
4 SUCCESSFACTORS provided to New Millenium Shoe, Ely Valls, or Javier Cruz, including but
5 not limited to the proposal that SUCCESSFACTORS prepared for New Millenium Shoe, which was
6 attached as Exhibit 3 to the Declaration of Jorge Corrales in Support of Preliminary Injunction and
7 Expedited Discovery (Dkt. No. 53).

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 28:**

9 Softscape objects to this request to the extent it calls for the production of material protected
10 by attorney-client privilege or the attorney work product doctrine.

11 Subject to the foregoing specific and general objections, Softscape will produce non-
12 privileged relevant, responsive documents in its possession, custody or control that are related to
13 recipients of any documents that SUCCESSFACTORS provided to New Millenium Shoe, Ely
14 Valls, or Javier Cruz relating to the SUCCESSFACTORS' proposal or the PRESENTATION or
15 any facts contained or statements made in the PRESENTATION.

16 **REQUEST FOR PRODUCTION NO. 29:**

17 ALL DOCUMENTS CONCERNING commentary, discussion, or analysis of any
18 DOCUMENTS or information that SUCCESSFACTORS provided to New Millenium Shoe, Ely
19 Valls, or Javier Cruz, including but not limited to the proposal that SUCCESSFACTORS prepared
20 for New Millenium Shoe.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 29:**

22 Softscape objects to this request to the extent it calls for the production of material protected
23 by attorney-client privilege or the attorney work product doctrine.

24 Subject to the foregoing specific and general objections, Softscape will produce non-
25 privileged relevant, responsive documents in its possession, custody or control that are related to
26 commentary, discussion, or analysis of any documents or information that SUCCESSFACTORS
27 provided to New Millenium Shoe, Ely Valls, or Javier Cruz relating to the SUCCESSFACTORS'
28 proposal or the PRESENTATION or any facts contained or statements made in the

1 PRESENTATION.

2 **REQUEST FOR PRODUCTION NO. 30:**

3 ALL DOCUMENTS CONCERNING access between SOFTSCAPE servers or computers
4 and Courtyard Marriott or the IP address 74.94.170.178, including but not limited to
5 COMMUNICATIONS between the same.

6 **RESPONSE FOR REQUEST FOR PRODUCTION NO. 30:**

7 Softscape objects to this request to the extent it calls for the production of material protected
8 by attorney-client privilege or the attorney work product doctrine.

9 Subject to the foregoing specific and general objections, Softscape will produce non-
10 privileged relevant, responsive documents in its possession, custody or control concerning access
11 between Softscape IP addresses and the Courtyard Marriott in Waltham, Massachusetts, or IP
12 address 74.94.170.178, between February 1, 2007 and March 4, 2008 relating to the
13 PRESENTATION or any facts contained or statements made in the PRESENTATION.

14 **REQUEST FOR PRODUCTION NO. 31:**

15 ALL DOCUMENTS CONCERNING the Courtyard Marriott in Waltham, Massachusetts,
16 including but not limited to travel itineraries, accounts payable, billing records, expense
17 reimbursements, calendar entries, and COMMUNICATIONS between SOFTSCAPE and Courtyard
18 Marriott.

19 **RESPONSE TO REQUEST FOR PRODUCTION NO. 31:**

20 Softscape objects to this request to the extent it calls for the production of material protected
21 by attorney-client privilege or the attorney work product doctrine.

22 Subject to the foregoing specific and general objections, Softscape will produce non-
23 privileged relevant, responsive documents in its possession, custody or control concerning
24 communications between Softscape IP addresses and the Courtyard Marriott in Waltham,
25 Massachusetts, including travel itineraries, accounts payable, billing records, expense
26 reimbursements and calendar entries referencing or indicating contact with the Courtyard Marriott
27 in Waltham, Massachusetts during the period between January 1, 2008 and March 4, 2008.

28 ///

REQUEST FOR PRODUCTION NO. 32:

All memoranda of understanding, licenses, proposals, communications setting forth proposals or orders, invoices, or purchase orders between SOFTSCAPE and its actual or prospective customers after January 1, 2008.

RESPONSE TO REQUEST FOR PRODUCTION NO. 32:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine. Softscape also objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION NO. 33:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **65.96.237.54**, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 33:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 69.96.237.54 between February 1, 2007 and March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.

REQUEST FOR PRODUCTION NO. 34:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **65.96.233.62**, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 34:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access

1 between Softscape IP addresses and the IP address 69.96.233.62 between February 1, 2007 and
2 March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the
3 PRESENTATION.

4 **REQUEST FOR PRODUCTION NO. 35:**

5 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the
6 IP address **62.140.137.160**, including but not limited to COMMUNICATIONS between the same.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 35:**

8 Softscape objects to this request to the extent it calls for the production of material protected
9 by attorney-client privilege or the attorney work product doctrine.

10 Subject to the foregoing specific and general objections, Softscape will produce non-
11 privileged relevant, responsive documents in its possession, custody or control concerning access
12 between Softscape IP addresses and the IP address 62.140.137.160 between February 1, 2007 and
13 March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the
14 PRESENTATION.

15 **REQUEST FOR PRODUCTION NO. 36:**

16 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the
17 IP address **217.118.122.88**, including but not limited to COMMUNICATIONS between the same.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 36:**

19 Softscape objects to this request to the extent it calls for the production of material protected
20 by attorney-client privilege or the attorney work product doctrine.

21 Subject to the foregoing specific and general objections, Softscape will produce non-
22 privileged relevant, responsive documents in its possession, custody or control concerning access
23 between Softscape IP addresses and the IP address 217.118.122.88 between February 1, 2007 and
24 March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the
25 PRESENTATION.

26 **REQUEST FOR PRODUCTION NO. 37:**

27 ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the
28 IP address **82.108.171.66**, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 37:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 82.108.171.66 between February 1, 2007 and March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.

REQUEST FOR PRODUCTION NO. 38:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **24.34.56.79**, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 38:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 24.34.56.79 between February 1, 2007 and March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.

REQUEST FOR PRODUCTION NO. 39:

ALL DOCUMENTS CONCERNING access to SOFTSCAPE servers or computers from the IP address **98.216.168.122**, including but not limited to COMMUNICATIONS between the same.

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

Softscape objects to this request to the extent it calls for the production of material protected by attorney-client privilege or the attorney work product doctrine.

Subject to the foregoing specific and general objections, Softscape will produce non-privileged relevant, responsive documents in its possession, custody or control concerning access between Softscape IP addresses and the IP address 98.216.168.122 between February 1, 2007 and

1 March 4, 2008 relating to the PRESENTATION or any facts contained or statements made in the
2 PRESENTATION.

3 **REQUEST FOR PRODUCTION NO. 40:**

4 DOCUMENTS sufficient to identify the persons who receive e-mails sent to
5 sales@softscape.com on March 4, 2008.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 40:**

7 Softscape objects to this request to the extent it calls for the production of material protected
8 by attorney-client privilege or the attorney work product doctrine.

9 Subject to the foregoing specific and general objections, Softscape will produce non-
10 privileged relevant, responsive documents in its possession, custody or control sufficient to identify
11 the persons who receive e-mails sent to sales@softscape.com on March 4, 2008.

12 **REQUEST FOR PRODUCTION NO. 41:**

13 ALL DOCUMENTS CONCERNING changes to the www.newmilleniumshoe.com website
14 in or after November 2007, including but not limited to COMMUNICATIONS involving Dave
15 Watkins or SOFTSCAPE regarding the website.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 41:**

17 Softscape objects to this request to the extent it calls for the production of material protected
18 by attorney-client privilege or the attorney work product doctrine.

19 Subject to the foregoing specific and general objections, Softscape will produce non-
20 privileged relevant, responsive documents in its possession, custody or control documents relating
21 to changes Dave Watkins or Softscape made to the www.newmilleniumshoe.com website in or after
22 November 2007.

23 **REQUEST FOR PRODUCTION NO. 42:**

24 ALL COMMUNICATIONS between vallsely@hotmail.com, on the one hand, and Dave
25 Watkins or SOFTSCAPE, on the other hand, from January 1, 2007 to present.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 42:**

27 Softscape objects to this request to the extent it calls for the production of material protected
28 by attorney-client privilege or the attorney work product doctrine.

1 Subject to the foregoing specific and general objections, Softscape will produce non-
2 privileged relevant, responsive documents in its possession, custody or control reflecting
3 communications between vallsely@hotmail.com, on the one hand, and Dave Watkins or
4 SOFTSCAPE, on the other hand, from February 1, 2007 and the present relating to the
5 PRESENTATION, any facts contained or statements made in the PRESENTATION, or access to
6 the ACE 275 Sales Demo.

7 **REQUEST FOR PRODUCTION NO. 43:**

8 DOCUMENTS supporting YOUR claim that "the Presentation was intended for Softscape's
9 internal use only" and "was marked and saved electronically on the company's server, and this
10 treatment of the Presentation was repeatedly emphasized to the Softscape sales force both orally and
11 in writing," as set forth in Paragraph 8 of the Declaration of David Watkins In Opposition to
12 Plaintiff's Motion to Strike and in Response to Order to Show Cause dated 03.26.08 ("Watkins
13 Decl.").

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 43:**

15 Softscape objects to this request to the extent it calls for the production of material protected
16 by attorney-client privilege or the attorney work product doctrine.

17 Subject to the foregoing specific and general objections, Softscape will produce non-
18 privileged relevant, responsive documents in its possession, custody or control that support
19 Softscape's claim that "the Presentation was intended for Softscape's internal use only" and "was
20 marked and saved electronically on the company's server, and this treatment of the Presentation was
21 repeatedly emphasized to the Softscape sales force both orally and in writing," as set forth in
22 Paragraph 8 of the Declaration of David Watkins In Opposition to Plaintiff's Motion to Strike and
23 in Response to Order to Show Cause dated 03.26.08 ("Watkins Decl.").

24 Dated: May 19, 2008

MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, PC

25
26 By:  BRYAN J. SINCLAIR

27 Attorneys for Defendant,
28 SOFTSCAPE, INC.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is 1400 Page Mill Road, Palo Alto, California 94304.

On May 19, 2008, I served a true copy of the following document described as **DEFENDANT SOFTSCAPE, INC.'S AMENDED RESPONSES TO PLAINTIFF'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS** on the interested parties in this action as follows:

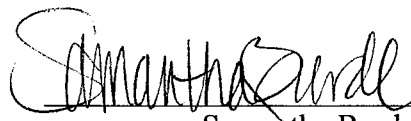
BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document to be sent from e-mail address sburde@mintz.com to the person at the e-mail address listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mr. Patrick E. Premo
Fenwick & West LLP
801 California Street
Mountain View, CA 94041
E-Mail: ppremo@fenwick.com

Counsel for SuccessFactors

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 19, 2008, at Palo Alto, California.


Samantha Burde

4331757v.2

EXHIBIT 10

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12 Attorneys for Plaintiff SUCCESSFACTORS, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware
23 corporation,

24 Defendant.

Case No. CV 08-1376 CW

**PLAINTIFF'S FIRST SET OF
INTERROGATORIES (Nos. 1-19)**

25 Pursuant to the Court's order permitting the parties to immediately initiate discovery and
26 Rules 26 and 33 of the Federal Rules of Civil Procedure, SuccessFactors requests that Defendant
27 Softscape, Inc. ("Softscape") respond in writing to each of the following Interrogatories within
28 thirty days after service, in accordance with the definitions and instructions set forth below.

DEFINITIONS

1. The terms "YOU," "YOUR," "DEFENDANT," or "SOFTSCAPE" mean and include, collectively and/or individually, Softscape, Inc., and its parents, subsidiaries, affiliates, predecessors or successor companies, if any, and its current and former officers, directors, employees, consultants, attorneys, authorized agents, sales representatives, distributors, dealers, direct and indirect contractors, and/or all other PERSONS acting or purporting to act on its behalf.

2. The terms "PLAINTIFF" or "SUCCESSFACTORS" mean and include, collectively and/or individually, SuccessFactors, Inc., and its parents, subsidiaries, affiliates, corporate divisions, predecessors or successor companies, if any, and its current and former officers, directors, employees, consultants, attorneys, authorized agents, sales representatives, distributors, dealers, direct and indirect contractors, and/or all other PERSONS acting or purporting to act on its behalf.

3. The terms "PERSON" or "PERSONS" shall include both natural persons, corporate or other business entities, and all other forms of legal entities, and shall include, but is not limited to, the following: corporations, partnerships, joint ventures, associations, business organizations, trade organizations, standards organizations, and sole proprietorships.

4. The terms "DOCUMENT" or "DOCUMENTS" have the broadest meaning accorded that term by Fed. R. Civ. P. 34(a) and includes, but is not limited to, all of the items defined in Fed. R. Evid. 1001, and all preliminary and final drafts of any such item. The terms shall include, but not be limited to, all written, electronic, phonic, graphic, and recorded matter of every type and description and every tangible thing that is or has been in YOUR possession, custody, or control, to which YOU have access or of which YOU have knowledge. "DOCUMENT(S)" shall also include, but shall not be limited to, the following items, whether printed or recorded or reproduced by hand: agreements, contracts, leases, communications (including intra-company communications), electronic mail, data from Personal Digital Assistants (including handheld computers, "smart phones," such as the palmOne™ Treo© and other similar devices and pagers), correspondence, postings on intranet or internet forums or websites (such as web pages and web logs or blogs), faxes, telegrams, cables, telexes, teletype messages, memoranda,

1 records, books, diaries, notebooks calendars (paper, electronic and otherwise), telephone and other
 2 logs, telephone and other bills, voicemail and transcriptions thereof, recorded distributions,
 3 forecasts, statistical statements, accounts, invoices, purchase orders, receipts, billing records, tapes,
 4 expense vouchers, minutes, summaries and other records of meetings, conferences, negotiations,
 5 conversations, investigations and interviews, sales brochures and literature, advertisements, price
 6 lists, trade letters, press releases, stenographic, handwritten and any other notes, projections,
 7 working papers, checks (front and back), check stubs and receipts, models, surveys, devices,
 8 pictures, photographs, films, computer records, data compilations, and voice and video recordings.
 9 "DOCUMENT(S)" shall not be limited in any way as to the form of storage (such as paper,
 10 microfiche, magnetic tape, magnetic disk, CD-ROM, DVD, optical disk, flash memory drive, or
 11 other storage device). A draft or non-identical copy is a separate document within the meaning of
 12 this term.

13 5. The terms "COMMUNICATION" or "COMMUNICATIONS" refer to any
 14 exchange of information by any means of transmission and the sending or receipt of information of
 15 any kind by or through any means, including but not limited to speech, writings, documents,
 16 language (machine, foreign or otherwise) of any kind, computer electronics or electronic data,
 17 sound, radio or video signals, telecommunications, telephone, teletype, facsimile, telegram,
 18 microfilm, microfiche, photographic film of all types or other media of any kind. The terms
 19 "COMMUNICATION" and "COMMUNICATIONS" also include, without limitation, all
 20 meetings, notices, requests, response, demands, complaints, press, publicity or trade releases, and
 21 postings on intranet or internet forums or websites (such as web pages and web logs or blogs).

22 6. "PRESENTATION" means the document shown as Exhibit 1 to the Declaration of
 23 Robert Bernshteyn in Support of Plaintiff's Ex Parte Application for a Temporary Restraining
 24 Order and Order to Show Cause re Preliminary Injunction, including all components, formats,
 25 versions, portions, notes, and version data thereof.

26 7. SUCCESSFACTORS' EVENTS means SUCCESSFACTORS sponsored or
 27 hosted events for its sales representatives, distributors, and/or actual or prospective customers,
 28 including, for example, SUCCESSFACTORS' PeopleConnect events.

1 8. The term "CONCERNING" means pertaining to, mentioning, commenting,
2 describing, analyzing, dealing with, resulting from, constituting, including, comprising, consisting
3 of, containing, referring to, reflecting, discussing, showing, stating, explaining, contradicting,
4 providing context to, evidencing, concerning, or recording a particular subject in whole or in part,
5 either directly or indirectly, or being in any way logically or factually connected with the matter
6 discussed or identified.

7 9. The term "IDENTIFY" means:

- 8 i. when referring to a natural person, the person's complete true name;
9 nicknames and pseudonyms; job title and employer; present or last known
10 residential or business address, telephone numbers, and e-mail addresses;
11 and the person's relationship to the DEFENDANT.
12 ii. when referring to a business, legal, or governmental entity or association,
13 the name and city of the main office;
14 iii. when referring to a product or thing, the title, version or release number,
15 any code or project name, or other name by which it has been referred, and
16 a general description of the product or thing;
17 iv. when referring to documents, the production number or type of document,
18 its general nature and subject matter, date of creation, all author(s),
19 addressee(s), and recipient(s), location, and URLs in the case of webpages.

20 10. The terms "or" and "and" shall be read in the conjunctive and in the disjunctive
21 wherever they appear, and neither of these words shall be interpreted to limit the scope of these
22 Requests.

23 11. The words "any," "all," and "each" shall be construed as "all and each."

24 12. The use of a verb in any tense shall be construed as the use of the verb in all other
25 tenses.

26 13. The singular form of any word shall be deemed to include the plural. The plural
27 form of any word shall be deemed to include the singular.
28

INSTRUCTIONS

1. In answering the following interrogatories, furnish all available information, including information in the possession, custody, or control of any of YOUR attorneys, directors, officers, agents, employees, representatives, associates, investigators or division affiliates, partnerships, parents or subsidiaries, and PERSONS under YOUR control, who have the best knowledge, not merely information of which YOU have personal knowledge.

2. If YOU cannot fully respond to the following interrogatories after exercising due diligence to secure the information requested thereby, so state, please so state and answer each such interrogatory to the fullest extent YOU deem possible, specify the portion of each interrogatory that YOU claim to be unable to answer fully and completely, state the facts upon which YOU rely to support YOUR contention that YOU are unable to answer the interrogatory fully and completely, and state what knowledge, information or belief YOU have concerning the unanswered portion of each such interrogatory.

3. If, in answering these interrogatories, YOU claim there is any ambiguity in either a particular interrogatory or a definition or an instruction, such claim is not a basis for refusing to respond, but rather YOU must state as part of YOUR response the language deemed to be ambiguous and the interpretation YOU chose or used in responding to the particular interrogatory.

4. If you are producing DOCUMENTS in connection with these interrogatories, selection of DOCUMENTS from the files and other sources and the numbering of such DOCUMENTS must ensure that the source of each DOCUMENT may be determined, if necessary. DOCUMENTS attached to each other shall not be separated. All DOCUMENTS shall be organized and produced pursuant to Rule 34(b) of the Federal Rules of Civil Procedure. Electronic records and computerized information must be produced in an intelligible format, together with a description of the system from which they originated sufficient to permit rendering the records and information intelligible. SOURCE CODE must be produced in native format, capable of being compiled and executed. Other electronic information must, if not produced in native format, be produced in an electronically searchable format. To the extent

1 YOU do not produce in native format, SUN reserves the right to request native format production
2 as to particular documents as to which such format is necessary.

3 5. Should YOU seek to withhold any information based on some limitation of
4 discovery (including, but not limited to, a claim of privilege) applicable to any communication or
5 meeting, please provide all non-privileged information falling within the scope of the
6 interrogatory. For each item of information contained in a DOCUMENT to which a claim of
7 privilege is made, identify such DOCUMENT with sufficient particularity, pursuant to Federal
8 Rule of Civil Procedure 26(b)(5), for purposes of a motion to compel, such identification to
9 provide at least the following:

- 10 (1) the privilege asserted and its factual basis;
- 11 (2) the names and positions of the author of the DOCUMENT and all other
12 PERSONS participating in the preparation of the DOCUMENT;
- 13 (3) the name and position of each individual or other PERSON to whom the
14 DOCUMENT, or a copy, was sent or otherwise disclosed;
- 15 (4) where not apparent, the relationship of the author, writer, sender, initiator,
16 addressee or any other recipient with each other;
- 17 (5) the date of creation or transmittal indicated on each DOCUMENT, or an
18 estimate of that date, indicated as such, if no date appears on the document;
- 19 (6) a description of any accompanying material transmitted with or attached to
20 such DOCUMENT;
- 21 (7) the number of pages in such DOCUMENT;
- 22 (8) the particular Interrogatory to which such DOCUMENT is responsive; and
- 23 (9) the general subject matter and whether any business or non-legal matter is
24 contained or discussed in such DOCUMENT.

25 For each COMMUNICATION or meeting claimed to be privileged,

- 26 (1) state the privilege asserted and its factual basis;
- 27 (2) identify all PERSONS and/or individuals involved in the
28 COMMUNICATION or present for all or any portion of the meeting;

(3) state the relationship of the author, writer, sender, initiator, addressee or any other recipient with each other;

(4) state the date and place of the COMMUNICATION or meeting;

(5) identify all DOCUMENTS CONCERNING the COMMUNICATION or meeting, state whether each such DOCUMENT predates, postdates or is contemporaneous with the communication or meeting, and identify all recipients of each such DOCUMENT.

6. If a DOCUMENT once existed and has subsequently been lost, destroyed, or is otherwise missing, please IDENTIFY the DOCUMENT and state the details concerning the loss of such DOCUMENT.

7. To the fullest extent permitted by Rule 26(e) of the Federal Rules of Civil Procedure, YOUR obligation to respond to these interrogatories is continuing, with responses to be supplemented to include subsequently acquired information.

8. If YOU object to any portion or aspect of any Interrogatory, provide all information responsive to the portion to which YOU do not object.

INTERROGATORIES

INTERROGATORY NO. 1

Describe in detail, separately, all facts CONCERNING the participation of each and every PERSON who assisted in the planning, creation, design, review, revision, transmission, or use of the PRESENTATION.

INTERROGATORY NO. 2

Describe in detail all facts CONCERNING YOUR claim that the PRESENTATION was intended for SOFTSCAPE's "internal use only," as described in Paragraph 8 of the Declaration of David Watkins in Opposition to Plaintiff's Motion to Strike, Docket No. 58, including but not limited to how it was so designated for internal use and when, and what specific "employment and business policies" forbade the dissemination or use of the PRESENTATION and the information therein.

INTERROGATORY NO. 3

IDENTIFY all PERSONS who received a copy of the PRESENTATION, including

whether each PERSON is or was YOUR employee, agent, partner, reseller, customer or prospect.

INTERROGATORY NO. 4

Describe in detail all facts CONCERNING YOUR claim that each Softscape employee who received a copy of the PRESENTATION “credibly denied disseminating the PRESENTATION outside the company,” as described in Paragraph 10(c) of the Declaration of David Watkins in Opposition to Plaintiff’s Motion to Strike, Docket No. 58.

INTERROGATORY NO. 5

Describe all COMMUNICATIONS between SOFTSCAPE, on the one hand, and New Millenium Shoe or Ely Valls, on the other hand, regarding SUCCESSFACTORS, any sales demos performed by SUCCESSFACTORS for New Millenium Shoe, and/or the PRESENTATION.

INTERROGATORY NO. 6

IDENTIFY all facts regarding Javier Cruz’s relationship to SOFTSCAPE, SUCCESSFACTORS, and/or New Millenium Shoe Company.

INTERROGATORY NO. 7

IDENTIFY all PERSONS (within Softscape and externally) who accessed a SUCCESSFACTORS’ sales demo account, including but not limited to ACE275.

INTERROGATORY NO. 8

Describe in detail all facts CONCERNING how any PERSON identified in response to Interrogatory No. 7, learned or acquired the user name and password for any SUCCESSFACTORS sales demo account, including but not limited to ACE275.

INTERROGATORY NO. 9

IDENTIFY and describe all SUCCESSFACTORS EVENTS or demonstrations YOU attended, heard, or viewed since January 2006, including but not limited to a description of who attended, dates of attendance and what information was obtained by YOU.

INTERROGATORY NO. 10

Other than the PRESENTATION, IDENTIFY any other presentation, white papers, competitive analyses or assessments, positioning papers, marketing or business plans, that YOU

1 have created since January 2006 that describe, analyze, or critique YOUR competitor's products
2 or services.

3 **INTERROGATORY NO. 11**

4 IDENTIFY all "current and former SuccessFactors customers" that were the "sources of
5 information" for statements made in the PRESENTATION, as claimed in Paragraph 5 of the
6 Declaration of David Watkins in Opposition to Plaintiff's Motion to Strike, Docket No. 58.

7 **INTERROGATORY NO. 12**

8 For each of the PRESENTATION's facts that YOU contend YOU received or inferred
9 from SUCCESSFACTORS' current or former customers, describe in detail how YOU received or
10 inferred the fact, including but not limited to a description of which customer was the source of
11 the fact and when.

12 **INTERROGATORY NO. 13**

13 State all facts in support of YOUR claim that "63% of their Customers left
14 [SuccessFactors] by 2008," as claimed in slide 3 of the PRESENTATION.

15 **INTERROGATORY NO. 14**

16 State all facts in support of YOUR claim regarding "failed implementations" and
17 purportedly "lost customers" as set forth in slides 5-6 and 8-12 of the PRESENTATION.

18 **INTERROGATORY NO. 15**

19 Describe in detail all computers or data storage media, including home computers of
20 SOFTSCAPE employees or consultants, that YOU have sought to preserve, including but not
21 limited to a description of the owners, possessors, or users of such computers or data storage
22 media, and whether it has been successfully and completely preserved.

23 **INTERROGATORY NO. 16**

24 IDENTIFY all known computers or data storage media that have at any time had a copy
25 of the PRESENTATION, whether in whole or in part, including any copy only in volatile
26 memory.

INTERROGATORY NO. 17

IDENTIFY all facts CONCERNING YOUR allegation that SUCCESSFACTORS “consented to and acquiesced” to conduct at issue in SUCCESSFACTORS’ COMPLAINT, as alleged in YOUR Second Affirmative Defense.

INTERROGATORY NO. 18

IDENTIFY all facts CONCERNING YOUR Fourteenth Affirmative Defense that SOFTSCAPE is not liable “for any act or omission of any subordinate,” including the name and identify of any such subordinate.

INTERROGATORY NO. 19

IDENTIFY all facts CONCERNING YOUR Sixteenth Affirmative Defense that “any non-truthful statement in the Presentation was not material.”

Dated: April 11, 2008

FENWICK & WEST LLP

By:



Patrick E. Premo

Attorneys for Plaintiff SUCCESSFACTORS, INC.

1283645

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12 Attorneys for Plaintiff SUCCESSFACTORS, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
22 corporation; and DOES 1-10, inclusive,

23 Defendants.
24
25
26
27
28

Case No. CV 08 1376 CW

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned declares that:

I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to this action. My business address is 801 California Street, Mountain View, CA 94041.

On the date set forth below, I served the attached:

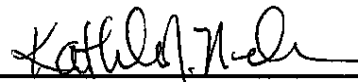
PLAINTIFF'S FIRST SET OF INTERROGATORIES (NOS. 1-19)

on the party in the subject action by placing a true copy thereof as indicated below, addressed as follows:

Jessica L. Grant, Esq.
Jonathan A. Patchen, Esq.
Taylor & Company Law Offices LLP
One Ferry Building, Suite 355
San Francisco, CA 94111
jgrant@tcolaw.com
jpatchen@tcolaw.com

- ☐ **U.S. MAIL:** I am familiar with our business practices for collecting and processing of mail for the United States Postal Service. Mail placed by me within the office for collection for the United States Postal Service would normally be deposited with the United States Postal Services that day in the ordinary course of business. The envelope(s) bearing the address(es) above was sealed and placed for collection and mailing on the date below following our ordinary business practices.
- ☐ **BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).
- ☐ **BY FEDERAL EXPRESS:** I caused such envelope(s) to be delivered to Federal Express for overnight courier service to the office(s) of the addressee(s).
- ☒ **BY ELECTRONIC MAIL:** I caused such document(s) to be delivered by electronic mail to the addressee(s).
- ☐ **BY FACSIMILE:** I caused a copy of such document(s) to be sent via facsimile transmission to the office(s) of the party(s) stated above and was transmitted without error.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 11, 2008 at Mountain View, California.


Kathleen J. Nelson

FENWICK & WEST LLP
ATTORNEYS AT LAW
MOUNTAIN VIEW

EXHIBIT 11

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Attorneys for Plaintiff
SUCCESSFACTORS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SUCCESSFACTORS, INC., a Delaware
corporation,

Plaintiff,

v.

SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

Case No. CV 08-1376 CW

MANUAL FILING NOTICE

Date: September 3, 2008
Time: 10:00 a.m.
Courtroom: G, 15th Floor
Judge: Hon. Bernard Zimmerman
Date of Filing: July 30, 2008
Trial Date: May 11, 2009

**RE: CONFIDENTIAL EXHIBITS 1, 2, 3, 11, 12, 15, 16, 17, 18, 19, 21, 22, 28, . TO
THE DECLARATION OF HENRY Z. CARBAJAL IN SUPPORT OF MOTION TO
COMPEL PRODUCTION OF DOCUMENTS, FURTHER INTERROGATORY
ANSWERS AND PROPER PRIVILEGE LOGS**

1 This filing is in paper or physical form only, and is being maintained in the case file in the
2 Clerk's office.

3 If you are a participant on this case, this filing will be served in hard-copy shortly.

4 For information on retrieving this filing directly from the court, please see the court's main
5 web site at <http://www.cand.uscourts.gov> under Frequently Asked Questions (FAQ).

6 This filing was not efiled for the following reason(s):

7 _____ Voluminous Document (PDF file size larger than efileing system allowances)

8 _____ Unable to Scan Documents

9 _____ Physical Object (description): _____

10 _____ Non Graphical/Textual Computer File (audio, video, etc.) on CD or other
11 media

12 X Item Under Seal

13 _____ Conformance with the Judicial Conference Privacy Policy (General Order 53).

14 _____ Other (description): _____

15 Dated: July 30, 2008

FENWICK & WEST LLP

17 By: /s/ Patrick Premo
18 Patrick Premo

19 Attorneys for Plaintiff
20 SUCCESSFACTORS, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 12

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Attorneys for Plaintiff
SUCCESSFACTORS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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Defendants.

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1 This filing is in paper or physical form only, and is being maintained in the case file in the
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6 This filing was not efiled for the following reason(s):

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8 ☐ Unable to Scan Documents

9 ☐ Physical Object (description): _____

10 ☐ Non Graphical/Textual Computer File (audio, video, etc.) on CD or other
11 media

12 ☒ Item Under Seal

13 ☐ Conformance with the Judicial Conference Privacy Policy (General Order 53).

14 ☐ Other (description): _____

15 Dated: July 30, 2008

FENWICK & WEST LLP

17 By: /s/ Patrick Premo
18 Patrick Premo

19 Attorneys for Plaintiff
20 SUCCESSFACTORS, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 13

Hearing Transcript re: Preliminary Injunction (J. Wilken) 3/27/2008 2:14:00 PM

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CLAUDIA WILKEN, JUDGE

SUCCESSFACTORS, INC., A)

DELAWARE CORPORATION,)

)

PLAINTIFF,)

)

VS.) NO. C 08-1376CW

)

SOFTSCAPE, INC., A)

DELAWARE CORPORATION, AND) PAGES 1 - 50

DOES 1-10, INCLUSIVE,)

)

DEFENDANTS.) OAKLAND, CALIFORNIA

_____) THURSDAY, MARCH 31, 2008

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF: FENWICK & WEST

555 CALIFORNIA STREET, 12TH FLOOR

SAN FRANCISCO, CALIFORNIA 94104

BY: PATRICK E. PREMO

LAURENCE F. PULGRAM, ATTORNEYS AT LAW

FOR DEFENDANTS. TAYLOR & CO. LAW OFFICES

1050 MARINA VILLAGE PARKWAY, SUITE 101

ALAMEDA, CALIFORNIA 94501

BY: JESSICA L. GRANT

JONATHAN A. PATCHEN, ATTORNEYS AT LAW

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

1 THURSDAY, MARCH 27, 2008 2:14 P.M.

2 P R O C E E D I N G S

3 THE CLERK: CALLING THE MATTER OF THE SUCCESSFACTORS

4 VERSUS SOFTSCAPE, CIVIL ACTION NO. C08-1376.

5 COUNSEL, PLEASE COME FORWARD, STATE YOUR APPEARANCE

6 FOR THE RECORD.

7 MR. PULGRAM: GOOD AFTERNOON, YOUR HONOR. LAURENCE

8 PULGRAM, FENWICK & WEST, FOR PLAINTIFF SUCCESSFACTORS.

9 WITH ME IS PATRICK PREMO.

10 THE COURT: WHY DON'T YOU TAKE THAT PODIUM THERE.

11 MS. GRANT: GOOD MORNING -- GOOD AFTERNOON.

12 JESSICA GRANT FROM TAYLOR & COMPANY ON BEHALF OF

13 SOFTSCAPE. AND I ALSO HAVE JONATHAN PATCHEN WITH ME.

14 THE COURT: ALL RIGHT. WELL, THIS IS ON FOR

15 PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION SUBSEQUENT TO

16 THE T.R.O. THAT WAS ENTERED PREVIOUSLY AND ALSO PLAINTIFF'S

17 MOTION FOR EXPEDITED DISCOVERY. I'M INCLINED TO CONTINUE THE

18 T.R.O. IN EFFECT AND CONVERT IT TO A PRELIMINARY INJUNCTION.

19 YOU MAKE TWO GOOD POINTS ABOUT THE LANGUAGE OF IT,

20 BOTH OF WHICH HAVE BEEN RESPONDED TO ADEQUATELY BY THE PLAINTIF

21 IN TERMS OF THE DISTRIBUTING THE TRADEMARK INTERNALLY VERSUS

22 EXTERNALLY AND ALSO FALSELY REPRESENTING TO BE A THIRD PARTY

23 WHEN YOU SAY THINGS, WHICH WAS THE ACTIVITY THAT YOUR CLIENT

24 ENGAGED IN THAT I FOUND ENJOINABLE.

25 AND THE WAY I PHRASED IT, I SUPPOSE, COULD BE

Hearing Transcript re: Preliminary Injunction (J. Wilken) 3/27/2008 2:14:00 PM

1 INTERPRETED SOME OTHER WAY, BUT IT WAS INTENDED TO BE NOT
2 MASQUERADING AS SOMEONE ELSE WHEN YOU SAY THINGS.

3 MS. GRANT: RIGHT. I THINK WE UNDERSTOOD THAT THAT
4 WAS THE COURT'S INTENTION. IT'S JUST THE WAY THAT THE LANGUAGE
5 READS RIGHT NOW, IT DOESN'T CONVEY THAT. AND IT WOULD ARGUABLY
6 PROHIBIT ENTIRELY LAWFUL TESTIMONIALS FROM CUSTOMERS, INDUSTRY
7 ANALYSTS.

8 THE COURT: YEAH. IF YOU GET SOME TESTIMONIALS FROM
9 THEIR CUSTOMERS AND YOU CAN GIVE A NAME OF SOMEBODY WHO'S GOING
10 TO VERIFY THAT THEY SAID THAT, NO PROBLEM.

11 MS. GRANT: RIGHT, NO --

12 THE COURT: BUT IF YOU'RE GOING TO PRETEND TO BE
13 SOMEBODY AND SAY THINGS THAT NOBODY EVER SAID, THAT'S A PROBLEM.

14 MS. GRANT: WHAT I MEANT TO SAY IS I THINK THE WAY
15 THAT THE -- PRONG 3 OF THE T.R.O. IS WRITTEN RIGHT NOW, IT WOULD
16 ACTUALLY -- IF WE GOT A CUSTOMER --

17 THE COURT: RIGHT, I UNDERSTAND.

18 (SIMULTANEOUS COLLOQUY.)

19 MS. GRANT: -- ANALYST WAS COMPLIMENTING US, WE STILL
20 COULD NOT UNDER THE CURRENT T.R.O. PUT THAT ON OUR WEBSITE --

21 THE COURT: YEAH, I UNDERSTAND YOUR POINT, AND I WILL
22 CHANGE THE LANGUAGE AS THE PLAINTIFF SUGGESTS.

23 I'M INCLINED TO ADD TO THE T.R.O. AN INJUNCTION WITH
24 RESPECT TO CERTAIN OF THE STATEMENTS. I RECOGNIZE THAT
25 STATEMENTS OF OPINION, STATEMENTS THAT CAN'T REALLY BE PROVED

1 TRUE OR FALSE CAN'T BE ENJOINED BECAUSE IT WOULD BE A FIRST
2 AMENDMENT VIOLATION AND SO ON, BUT STATEMENTS THAT ARE CLEARLY
3 PROVABLE EASILY AS FACTS, BE THEY TRUE OR FALSE, THAT YOU
4 HAVEN'T PROVED ARE TRUE, THEN THERE'S NO REASON NOT TO ENJOIN
5 YOUR FURTHER STATEMENT OF THEM.

6 AND I MUST SAY I'M NOT AT ALL IMPRESSED BY A PRESS
7 RELEASE THAT SEEMS TO REAFFIRM THE TRUTH OF STATEMENTS THAT YOU
8 DON'T HAVE ANY REASON TO BELIEVE ARE TRUE. SO I THINK YOU NEED
9 TO HAVE SOME TALKS WITH YOUR CLIENT ABOUT BUSINESS PRACTICES
10 HERE.

11 MS. GRANT: OKAY, YOUR HONOR.

12 THE COURT: BUT -- SO ANYWAY, OF THE STATEMENTS THAT
13 YOU SUGGEST SHOULD BE IN THERE, SOME I THINK COULD BE ENJOINED
14 AND OTHERS COULD NOT BE. AND I DON'T WANT TO GO THROUGH THEM
15 ONE BY ONE. I'LL JUST USE MY JUDGMENT WHEN I'VE PUT OUT THE
16 ORDER.

17 WITH RESPECT TO DISCOVERY, I'M INCLINED TO -- WELL,
18 WHAT I'M REALLY GOING TO DO IS JUST OPEN UP DISCOVERY, PERIOD.
19 YOU CAN MAKE YOUR INITIAL DISCLOSURES MAYBE NEXT WEEK. YOU CAN
20 HAVE YOUR DISCOVERY CONFERENCE NEXT WEEK. WE CAN JUST MOVE UP
21 THE WHOLE REGULAR FORMAL DISCOVERY. AND IN TERMS OF ANYTHING --
22 I THINK IF DISCOVERY IS OPENED, YOU CAN JUST TAKE WHAT YOU NEED
23 THAT WAY RATHER THAN --

24 MR. PULGRAM: WHEN YOU NEED IT.

25 THE COURT: -- NECESSARILY NEEDING ANYTHING

1 PARTICULAR EXPEDITED.

2 MR. PULGRAM: I BELIEVE THAT'S A GOOD APPROACH, YOUR
3 HONOR, BECAUSE THE MORE INFORMATION THAT WE GET, THE MORE WE
4 FIND THERE ARE LEADS TO FOLLOW THAT AREN'T NECESSARILY SPELLED
5 OUT EXPLICITLY IN THIS REQUEST OR THAT.

6 THE COURT: I MEAN, I THINK THE THINGS THAT NEED TO
7 BE GOTTEN QUICKLY ARE INFORMATION ABOUT WHO DID ACCESS THEIR --
8 THE PROTECTED PORTIONS OF THEIR WEBSITE AND USE THAT INFORMATIO
9 TO CREATE THIS PRESENTATION.

10 MS. GRANT: MAY I --

11 THE COURT: SOMEBODY CREATED IT, AND WE DON'T KNOW
12 WHO THAT WAS OR HOW THEY GOT THEIR ACCESS.

13 MS. GRANT: MAY I BE HEARD ON THAT ACTUALLY? I THINK
14 THAT INFORMATION IS BEFORE YOU. THE C.E.O., DAVE WATKINS,
15 ACCESSED THE DEMONSTRATION, AND I JUST REALLY WANT TO STRESS
16 SOMETHING. THIS IS NOT A PROTECTED WEBSITE.

17 THE COURT: NO, I KNOW THERE'S CERTAIN PARTS OF IT,
18 THOUGH, THAT ARE --

19 MS. GRANT: NO.

20 THE COURT: -- PASSWORD PROTECTED.

21 MS. GRANT: HE ONLY ACCESSED ONE THING, WHICH WAS A
22 DEMO, LIKE A MARKETING DEMONSTRATION, A LITTLE SLIVER OF HOW
23 THEIR PRODUCT WORKS. HE HAD A USER I.D, AND HE HAD A PASSWORD
24 THAT WAS PROVIDED. HE'S A C.E.O. FROM ANOTHER COMPANY. AND
25 THAT PASSWORD WAS PROVIDED TO THE OTHER COMPANY.

1 IMPORTANTLY, SUCCESSFACTORS PUT NO RESTRICTIONS, NONE
2 WHATSOEVER, ON THE USE OR DISCLOSURE OF THAT PASSWORD. HE
3 SIMPLY ENTERED IN THE USER NAME, ENTERED IN THE PASSWORD, DID
4 THE DEMONSTRATION.

5 HE TOOK A FEW SCREEN SHOTS, THAT'S IT, A FEW OF THE
6 SCREEN SHOTS THAT ARE IN THE PRESENTATION, BUT THERE IS NOTHING
7 ON THE SUCCESSFACTORS DEMONSTRATION, WHICH IS ACCESSIBLE TO THE
8 PUBLIC, IT'S THE SAME ONE THEY USE AT A TRADE SHOW. THERE'S NO
9 NDA. THERE'S NOTHING LIKE WHEN YOU GO ON THE WEBSITE, AND YOU
10 CLICK "I AGREE TO THESE TERMS AND CONDITIONS." THERE'S NOTHING,
11 THERE'S NO RESTRICTIONS WHATEVER ON THE USE AND DISCLOSURE OF
12 THAT INFORMATION.

13 SO THIS ISN'T A SITUATION -- THEY PUT A LOT OF
14 HYPERBOLE IN THE BRIEF TO MAKE IT SOUND LIKE IT'S SOMETHING
15 VICIOUS AND SINISTER THAT WE DID HERE. TO BE CLEAR, HE SIMPLY
16 ACCESSED A MARKETING DEMO. HE DID NOT SNEAK IN THE BACK DOOR
17 AND HACK THROUGH THEIR COMPUTER. HE DIDN'T CHANGE OR ALTER
18 ANYTHING. HE SIMPLY USED THE DEMONSTRATION IN EXACTLY THE WAY
19 IT WAS DESIGNED, MUCH LIKE A RESTAURANT CRITIC WHO CONCEALS HIS
20 IDENTITY, USES THE RESTAURANT, EXACTLY THE WAY -- IN THE MANNER
21 IT WAS INTENDED.

22 THE COURT: WELL, I GUESS THE PLAINTIFF CAN SPEAK TO
23 THIS, BUT MY IMPRESSION FROM THE PAPERS WERE THAT THERE WERE
24 THREE PARTICULAR AREAS THAT THEY COULD SEE HAD BEEN ACCESSED,
25 NOT JUST ONE.

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1 AND I DON'T KNOW IF YOU'RE SAYING YOUR C.E.O. GOT
2 THIS LOG-IN AND PASSWORD FROM THE C.E.O. OF ANOTHER COMPANY WHC
3 IS A CUSTOMER OF THEIRS OR GOT IT FROM THIS L.A. PERSON WHO
4 MASQUERADED AS A CUSTOMER.

5 MS. GRANT: DAVE WATKINS IS THE C.E.O. OF SOFTSCAPE.
6 HE'S ALSO THE C.E.O. OF NEW MILLENNIUM SHOE COMPANY.

7 MR. PULGRAM: OH, MY GOD.

8 I'M SORRY.

9 MS. GRANT: EXCUSE ME.

10 THE COURT: THERE IS SUCH A THING?

11 MS. GRANT: YES, THAT'S A REAL COMPANY.

12 SO THEY ASKED FOR THE PASSWORD. THEY GAVE IT TO HIM.

13 THE COURT: WAIT. THEY WHO?

14 MS. GRANT: NEW MILLENNIUM SHOE COMPANY. ELY.

15 THE COURT: THIS ELY.

16 MS. GRANT: ELY, WHO IS A REAL PERSON, WHO IS A REAL
17 EMPLOYEE THERE.

18 THE COURT: OF THE SHOE COMPANY.

19 MS. GRANT: OF THE COMPANY.

20 THE COURT: BUT NOT OF SOFTSCAPE.

21 MS. GRANT: NO, BUT THERE IS -- IT'S VERY IMPORTANT.

22 THERE'S NO RESTRICTION WHATSOEVER ON THE USE OF THAT PASSWORD.
23 FOR INSTANCE, SOMETIMES WHEN YOU GET A PASSWORD --

24 THE COURT: I'M SORRY. I STILL HAVEN'T GOTTEN THE
25 FACTS DOWN. SO THIS PERSON ELLIE (PHONETIC) OR ELI (PHONETIC).

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1 MS. GRANT: ELY.

2 THE COURT: ELY.

3 OKAY. SO ELY IS THE C.E.O. OF NEW MILLENNIUM SHOES?

4 (SIMULTANEOUS COLLOQUY.)

5 THE COURT: NO, WATKINS IS THE C --

6 MS. GRANT: AND ELY IS AN EMPLOYEE --

7 (SIMULTANEOUS COLLOQUY.)

8 THE COURT: OF NEW MILLENNIUM, NOT OF SOFTSCAPE.

9 MS. GRANT: CORRECT. SO --

10 THE COURT: SO ELY WENT AND POSED AS A PERSON
11 INTERESTED IN PURCHASING THIS SOFTWARE FOR NEW MILLENNIUM?

12 MS. GRANT: CORRECT.

13 THE COURT: IN THE COURSE OF THAT GOT THE LOG-IN AND
14 PASSWORD.

15 MS. GRANT: CORRECT.

16 THE COURT: AND THEN GAVE IT TO WATKINS.

17 MS. GRANT: CORRECT.

18 THE COURT: FOR THE PURPOSE OF ACCESSING INFORMATION
19 THAT COULD BE ACCESSED ONLY BY SOMEONE WHO THE PLAINTIFF THOUG
20 WAS A CUSTOMER.

21 MS. GRANT: A PROSPECTIVE CUSTOMER.

22 THE COURT: PROSPECTIVE CUSTOMER.

23 MS. GRANT: BUT IMPORTANTLY, YOUR HONOR, IF THEY
24 REALLY WANTED TO RESTRICT THE USE TO PROSPECTIVE CUSTOMERS, THE
25 COULD PUT -- WHEN THEY SEND YOU THE EMAIL WITH THE USER NAME AND

1 PASSWORD, THEY COULD SAY THIS IS ONLY FOR THIS PARTICULAR
2 PERSON, CANNOT BE SHARED OR DISCLOSED TO ANYONE ELSE, AS OTHER
3 COMPANIES DO.

4 AND, IN FACT, ON OUR DEMO, WE HAVE A NONDISCLOSURE
5 AGREEMENT. WE SPECIFICALLY RESTRICT USE TO THAT PARTICULAR
6 PERSON. IT CANNOT BE SHARED WITH ANYONE ELSE. CANNOT BE
7 DISCLOSED.

8 THE COURT: RIGHT. I'M SURE THEY'LL DO SO NOW THAT
9 THEY'VE SEEN WHAT YOU CAN DO WITHOUT THAT.

10 MS. GRANT: BUT, YOUR HONOR, THERE'S NOTHING WRONGFUL
11 ABOUT -- THIS WAS COMPLETELY AUTHORIZED ACCESS. IT'S NO
12 DIFFERENT THAN THE RESTAURANT CRITIC, WHO DOES CONCEAL HIS TRUE
13 IDENTITY SO HE'S NOT DISCOVERED AND CAN WRITE AN OPINION, AND
14 IT'S NOT A TRESPASS BECAUSE HE'S USING THE RESTAURANT IN EXACTLY
15 THE MANNER IN WHICH IT WAS INTENDED.

16 HERE, THE DEMONSTRATION -- HE JUST SIMPLY DID A
17 DEMONSTRATION. THAT'S ALL HE DID. HE DID NOT CAUSE ANY DAMAGE
18 TO THE SYSTEM. HE DID NOT CHANGE ANY DATA. THERE WAS NO
19 CORRUPTION OR INTERRUPTION OF SERVICE LIKE THESE CASES UNDER THE
20 CFAA YOU NORMALLY SEE. AND ALTHOUGH --

21 THE COURT: BUT THEY SAY THERE WERE THREE DIFFERENT
22 AREAS. AND YOU'RE SEEMING TO SAY THERE WAS ONLY ONE.

23 MS. GRANT: RIGHT. HE ABSOLUTELY ONLY USED THE DEMO.
24 AND THAT'S VERY --

25 THE COURT: THAT SEEMS TO BE A DISPUTED FACT.

1 MS. GRANT: AND IT'S VERY DIFFERENT THAN THE
2 PRESENTATION. HE DID CREATE THE PRESENTATION AS HIS DECLARATION
3 ATTESTS TO. THE -- BUT HE USED IT FROM ALL THESE DIFFERENT
4 PUBLIC SOURCES. THE MAIN ONE WAS ACTUALLY THEIR WEBSITE, THEIR
5 PUBLIC WEBSITE, AND TRADE SHOWS, WHICH ARE PUBLIC, AND WEBINARS,
6 WHICH ARE PUBLIC.

7 AND HE PIECED TOGETHER, ALONG WITH OTHER PEOPLE IN
8 THE COMPANY, ALL OF THIS INFORMATION, SOME OF WHICH WERE FROM
9 CUSTOMER TESTIMONIALS. THE POINT IS OF THE ENTIRE PRESENTATION,
10 WHICH IS 43 PAGES, THEY ONLY TALK ABOUT TEN STATEMENTS THAT THEY
11 CLAIM IS FALSE. AND I THINK AN INJUNCTION AT THIS POINT --

12 REALLY, I DON'T SEE THE IRREPARABLE INJURY WHEN IT'S VERY CLEAR
13 THAT SOFTSCAPE HAS NEVER BEEN TIED TO THIS. AND I JUST --

14 IF YOU'LL BEAR WITH ME FOR ONE MINUTE, YOUR HONOR.

15 THE COURT: I DIDN'T MEAN TO OPEN THIS UP FOR
16 BROAD --

17 (SIMULTANEOUS COLLOQUY.)

18 THE COURT: -- ARGUMENT FROM YOU. I HAD A COUPLE OF
19 COMMENTS I WANTED TO MAKE ABOUT MY INCLINATION AND A COUPLE OF
20 QUESTIONS I WANT TO ASK, AND THEN I WILL TURN TO YOU FOR
21 ARGUMENT, BUT YOU'RE SORT OF JUMPING THE GUN.

22 (SIMULTANEOUS COLLOQUY.)

23 THE COURT: THE DISCOVERY AREAS IS WHAT I WAS GETTING
24 TO THAT I'M CONCERNED ABOUT ARE WHO GOT THE ACCESS AND HOW, AND
25 WHO WROTE IT AND HOW. I GUESS SOME OF THAT IS NOW KNOWN. AND

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1 THEN IT'S ONE THING TO RETAIN DOCUMENTS THAT ARE ON COMPUTERS,
2 BUT I ALSO KNOW GENERALLY THAT COMPUTERS HAVE MYSTERIOUS WAYS
3 RETAINING INFORMATION ABOUT HOW THINGS HAPPENED AND WHAT
4 HAPPENED IN NON-TRANSPARENT WAYS.

5 AND SO RETAINING DOCUMENTS ISN'T ENOUGH TO RETAIN
6 SORT OF META DATA KINDS OF THINGS THAT MIGHT RESIDE ON COMPUTERS
7 THAT MIGHT BE EPHEMERAL. SO I'M CONCERNED ABOUT SOME KIND OF
8 EVIDENCE PRESERVATION OR DISCOVERY THAT WOULD ADDRESS THAT
9 PROBLEM IN TERMS OF TRACKING DOWN WHO REALLY OPENED THIS GMAIL
10 ACCOUNT, WHO REALLY SENT IT OUT ON THAT ACCOUNT, AND WHO ALL GOT
11 IT, I GUESS, IS ANOTHER.

12 MS. GRANT: AND WE DO HAVE THAT INFORMATION FROM
13 GOOGLE, YOUR HONOR. THE PAPERS THAT THEY FILED LAST NIGHT --

14 THE COURT: WELL, SOME HOTEL, BUT WE DON'T KNOW WHO
15 WAS IN THERE.

16 MS. GRANT: THE PROBLEM IS THEY ONLY GAVE YOU HALF
17 THE STORY, AND IT WAS VERY MISLEADING, WHAT THEY FILED LAST
18 NIGHT. THAT WASN'T ALL OF GOOGLE'S RESPONSE.

19 THE EMAIL ACCOUNT THAT WAS CREATED WAS NOT CREATED IN
20 MASSACHUSETTS. IT WAS CREATED IN SINGAPORE. AND IT WAS CREATED
21 IN SINGAPORE, AND THE ACTUAL TRANSMISSION OF THE PRESENTATION
22 WAS DONE FROM THE SINGAPORE IP ADDRESS. THEY DID NOT GIVE YOU
23 THAT INFORMATION.

24 THEN A WEEK LATER, THERE WAS A LOG-IN IN
25 MASSACHUSETTS, AND A WEEK AFTER THAT, THERE WAS ANOTHER ONE IN

1 CHINA. BUT THE CRITICAL ONE, THE CRITICAL ONE WHERE THIS
2 EMANATED FROM, WAS SINGAPORE. WE DON'T HAVE AN OFFICE IN
3 SINGAPORE. THEY DO.

4 THIS COULD BE A DISGRUNTLED EMPLOYEE WHO SENT IT OUT
5 TO -- TO HARM SUCCESSFACTORS. 'CAUSE IT CERTAINLY DOESN'T INURE
6 TO OUR BENEFIT, QUITE FRANKLY.

7 I JUST THINK THAT THEY DID NOT PROVIDE YOU WITH
8 GOOGLE'S RESPONSE TO THE SUBPOENA. THEY TRIED TO MAKE IT LOOK
9 LIKE THIS CAME FROM MASSACHUSETTS, FROM US AGAIN, WHEN, IN FACT,
10 IT DIDN'T. IT CAME FROM SINGAPORE.

11 THE COURT: OKAY.

12 MS. GRANT: SO I JUST THINK THAT THERE'S BEEN A LOT
13 OF HYPERBOLE AND MISLEADING INFORMATION TO THIS COURT. WE DO
14 KNOW WHERE IT CAME FROM. IT CAME FROM SINGAPORE. THAT'S WHERE
15 THE IP ADDRESS -- ALL OF THIS CAME FROM SINGAPORE.

16 THE COURT: WELL, SINGAPORE'S A BIG PLACE, AND
17 THERE'S A LOT OF PEOPLE.

18 MS. GRANT: BUT WE DON'T --

19 (SIMULTANEOUS COLLOQUY.)

20 MR. PULGRAM: WHILE WE'RE ON THIS POINT -- I'LL
21 RESPOND WHENEVER YOUR HONOR GIVES ME AN OPPORTUNITY.

22 THE COURT: OKAY.

23 MR. PULGRAM: BUT --

24 THE COURT: LET ME JUST SEE IF I HAD ANY OTHER
25 QUESTIONS.

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1 OH, THERE'S -- I FORGET WHO IT WAS. SOMEBODY SEEMED
2 TO USE SOME FEDERAL CIRCUIT CITES. IS THERE ANY REASON THIS
3 WOULD GO TO THE FEDERAL CIRCUIT? IT WOULD TO THE NINTH CIRCUIT,
4 WOULDN'T IT? IT'S NOT A PATENT.

5 MR. PULGRAM: CORRECT.

6 THE COURT: YOU BOTH AGREE THIS WOULD GO TO THE NINTH
7 CIRCUIT, NOT THE FEDERAL --

8 MS. GRANT: I AGREE.

9 THE COURT: OKAY.

10 MS. GRANT: YOUR HONOR, BEFORE I FORGET, I DO WANT
11 YOU TO KNOW THAT THE COMPUTERS THAT ARE AT ISSUE HAVE ALL BEEN
12 MIRROR-IMAGED.

13 THE COURT: OKAY. GOOD. WELL, "AT ISSUE" WE DON'T
14 KNOW WHAT THAT MEANS.

15 MS. GRANT: WELL, OF ANYONE WHO HAD ACCESS TO -- WHO
16 CREATED THE PRESENTATION. I MEAN, OBVIOUSLY, WE HAVE NO IDEA
17 WHO DISSEMINATED IT. I MEAN, THAT'S UNDISPUTED. NO ONE KNOWS.

18 BUT IN TERMS OF INTERNALLY WHO CREATED IT, ALL OF
19 THOSE COMPUTERS ARE UNDER LOCK AND KEY IN TERMS OF THE IMAGES.
20 AND THEN MR. WATKINS, WHO ACCESSED THE DEMO, HIS HOME COMPUTER
21 AND HIS BUSINESS COMPUTER HAVE -- THAT'S ALL UNDER LOCK AND KEY,
22 AND THOSE IMAGES ARE BEING PRESERVED.

23 THE COURT: OKAY. ALL RIGHT.

24 SO JUST STICKING WITH THE DISCOVERY FOR A MINUTE,
25 THEN, IS IT YOUR VIEW THAT IF WE SIMPLY MOVED UP THE DATE FOR

1 THE INITIAL DISCLOSURES AND THE INITIAL CONFERENCE AND THE
2 OPENING OF FORMAL DISCOVERY, THAT THAT WOULD BE ADEQUATE FOR
3 YOUR PURPOSES?

4 MR. PULGRAM: YOUR HONOR, WE WOULD LIKE TO GET A
5 SPECIFIC ORDER WITH RESPECT TO PRESERVATION OF COMPUTERS AS
6 FOLLOWS. THEY HAVE STATED THAT THEY HAVE NO WAY -- NO
7 CENTRALIZED WAY OF DETERMINING WHO ACCESSED THE PRESENTATION C
8 THEIR SITE. THEY DON'T HAVE A LOG ON THE SERVER THAT CONTROLS
9 ACCESS TO THAT DOCUMENT, WHICH MEANS THAT THE ONLY PLACE TO FINI
10 OUT WHO GOT IT AND WHEN AND HOW WAS TO LOOK AT THE INDIVIDUAL
11 COMPUTERS OF THOSE PEOPLE WHO DID GET.

12 SO IT WE THINK THAT WE NEED TO PRESERVE THE EVIDENCE
13 ON THE COMPUTERS OF EVERYBODY WHO GOT A COPY OF THIS
14 PRESENTATION. THEY'VE IDENTIFIED SOME. I DON'T --

15 THE COURT: YOU'RE TALKING ABOUT THEIR INTERNAL
16 COMPUTERS, OR THE CUT -- OR THE OUTSIDE PEOPLE --

17 MR. PULGRAM: I'M TALKING ABOUT THE PEOPLE IN THE
18 DEFENDANT.

19 THE COURT: OKAY.

20 MR. PULGRAM: BECAUSE UNLIKE A TYPICAL SITUATION
21 WHERE YOU HAVE A DOCS OPEN OR HUMMINGBIRD OR SOME OTHER
22 WORD-PROCESSING SYSTEM WHERE YOU CAN SEE ACCESSES AND CHANGE
23 THEY'VE ASSERTED THAT THEY DON'T HAVE THAT.

24 THEY'VE ASSERTED THAT THERE'S NO WAY TO TRACK WHO
25 LOGGED IN, MADE A COPY OF THE DOCUMENT AND TOOK IT AWAY. THE

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1 WAY THAT WE HAVE TO DO THAT, IF THEY DON'T HAVE THAT CENTRALIZED
2 DATA SOURCE, IS TO PRESERVE THE INDIVIDUAL COMPUTERS OF THE
3 PEOPLE WHO GOT IT.

4 SOME OF THOSE, IT SOUNDS LIKE --

5 THE COURT: YOU DON'T KNOW WHO GOT IT.

6 MR. PULGRAM: NO, THEY DO. I'M TALKING HERE
7 INTERNALLY. I'M TALKING ABOUT PEOPLE INTERNAL AT SOFTSCAPE.
8 ANYBODY WHO GOT A COPY OF THIS WILL HAVE A RECORD IN THEIR
9 REGISTRY OR OTHER PLACES WHERE YOU CAN FIND THE META DATA, THAT
10 THEY WENT TO THIS PLACE, AND THEY COPIED THIS DOCUMENT AT THIS
11 TIME AND THE THINGS THAT THEY, THEN, DID WITH IT.

12 SO WHAT I'M SAYING IS, UNFORTUNATELY, IF THEY, AS
13 THEY SAY, DON'T HAVE A CENTRALIZED PLACE THAT TRACKS THAT, THE
14 PLACE THAT YOU HAVE TO DO IT IS AT THE INDIVIDUAL LOCATION OF
15 THE PEOPLE WHO GOT THIS DOCUMENT.

16 THE COURT: AND HOW MANY PEOPLE WOULD WE BE TALKING
17 ABOUT?

18 MR. PULGRAM: I DO NOT KNOW. WE HAVEN'T BEEN TOLD
19 THAT. IT'S ONE OF THE MANY THINGS THAT WE HAVEN'T BEEN TOLD
20 YET. WE HAVEN'T BEEN TOLD -- IT NOW HAS BEEN ANNOUNCED
21 YESTERDAY THAT DAVE WATKINS ACTUALLY WROTE THIS PRESENTATION.
22 THAT'S THE FIRST THAT WE HEARD ABOUT IT. SO WE DON'T KNOW HOW
23 MANY PEOPLE THERE ARE, AND I THINK THAT THEY --

24 ACTUALLY, IT'S INCUMBENT UPON THEM TO PRESERVE THIS
25 EVIDENCE SO WE CAN SEE WHO GOT IT. THIS IS THE WAY WE'RE GOING

1 TO FIGURE OUT HOW IT GOT OUT. OBVIOUSLY, IT GOT OUT OF THE
2 COMPANY. IT WAS IN THE COMPANY AND SOMEONE LET IT OUT ON
3 PURPOSE, BY ACCIDENT -- THEY CAN MAKE WHATEVER ARGUMENTS THEY
4 WANT ABOUT THIS. THIS WAS A SALES DOCUMENT DISTRIBUTED BY
5 SALESPeOPLE TO MAKE A SALE.

6 WE HAVE TO BE ABLE TO FIGURE THAT OUT, AND THE ONLY
7 WAY WE CAN DO THAT IS BY PRESERVING THOSE RECORDS, SO THAT IS
8 ONE POINT ON THE EVIDENCE PRESERVATION.

9 THE OTHER POINT THAT I THINK IN TERMS OF TIMING OF
10 THIS DISCOVERY IS, I DO THINK THAT IT'S APPROPRIATE TO GIVE
11 IMMEDIATE ACCESS TO THE DOCUMENTS REFLECTING THE CREATION OF TH
12 DOCUMENTS. THEY HAVE BEEN SEQUESTERED, ACCORDING TO THE
13 DEFENDANTS. IT WOULD BE APPROPRIATE TO HAVE THEM PRODUCED
14 WITHIN A SHORT PERIOD OF TIME WITHOUT ANY LONG-TERM FIGHTING
15 OVER WHETHER OR NOT WE'RE GOING TO GET IT, WITHOUT 30 DAYS' WAIT
16 BEFORE OBJECTIONS, BEFORE NEGOTIATIONS, BEFORE DELIVERY. YOU
17 KNOW HOW IT WORKS. WE ALL KNOW HOW IT WORKS.

18 THE COURT: WHAT IS IT YOU'RE SAYING AGAIN THAT YOU
19 WANT?

20 MR. PULGRAM: THERE, I'M TALKING ABOUT THE DOCUMENTS
21 THAT REFLECT THE CREATION, THE CHANGES, AND THE COMMUNICATIONS
22 INTERNALLY ABOUT THE PRESENTATION.

23 THE COURT: WELL, I'M STILL NOT FOLLOWING. SO
24 WATKINS GETS SOME DOCUMENTS ON HIS COMPUTER, AND HE CUTS AND
25 PASTES AND DOES THINGS WITH THEM ON HIS COMPUTER, AND THEN HE

1 CREATES A DOCUMENT.

2 WHAT IS IT THAT YOU WANT IN THAT PROCESS?

3 MR. PULGRAM: SO HE ALSO WORKS WITH ELY VALLS,

4 SUPPOSEDLY SOME INDEPENDENT COMPANY WHO HAS A ONE-PAGE WEBSIT

5 TO SELL SHOES. HE ALSO, WE BELIEVE, WORKED WITH A GUY NAMED

6 MARTIN NECK, WHOSE NAME APPEARS IN OUR LOG OF VISITORS.

7 WE HAVE FOUR DIFFERENT IP ADDRESSES ASSOCIATED WITH

8 SOFTSCAPE THAT HAVE ACCESSED THIS PASSWORD-PROTECTED ACCOUNT

9 THAT INCLUDES ENGLAND, AND I WOULD DARE SAY THERE'S NOT A

10 SOFTSCAPE IN ENGLAND WHO WORKS FOR MILLENNIUM SHOE, TWO HOME I

11 ADDRESSES THAT HAVE NOT YET BEEN IDENTIFIED FOR US BY COMCAST.

12 AND THE FOURTH PLACE THAT ACCESSED THE PASSWORD-PROTECTED PAF

13 OF THE SITE IS SOFTSCAPE'S OWN HEADQUARTERS.

14 SO WE KNOW THAT THERE ARE A NUMBER OF PEOPLE WHO ARE

15 INVOLVED IN THE CREATION OF THIS DOCUMENT. IT'S NOT JUST --

16 MR. WATKINS HAS SAID THAT HE WAS ONE OF THE CREATORS.

17 SECOND --

18 THE COURT: SO WHAT ARE YOU -- I'M NOT STILL CLEAR ON

19 WHAT IT IS YOU WANT ABOUT THAT.

20 MR. PULGRAM: WHAT I WANT ARE THE DOCUMENTS THAT

21 REFLECT THE CREATION AND AMENDMENT TO AND COMMUNICATIONS ABOU

22 THE PRESENTATION WITHIN THE COMPANY.

23 THE COURT: OKAY.

24 I MEAN -- ALL RIGHT. I GUESS --

25 MR. PULGRAM: I UNDERSTAND.

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1 THE COURT: -- UNDERSTAND WHAT YOU'RE SAYING.

2 MR. PULGRAM: RIGHT, RIGHT, RIGHT. SO --

3 THE COURT: SO WHAT ELSE?

4 MR. PULGRAM: THE -- WE DO WANT THE DOCUMENTS ABOUT

5 THE CONNECTION BETWEEN ELY VALLS AND HER PURPORTED CONSULTANT

6 WE BELIEVE THAT'S VERY IMPORTANT TO THIS -- THE OVERALL SCHEME

7 THAT WE HAVE SEEN UNFOLDING HERE.

8 IN ADDITION TO GETTING TO THAT PASSWORD-PROTECTED

9 SITE, WHICH A COMPETITOR KNOWS DOGGONE WELL IS NOT A

10 PASSWORD-PROTECTED SITE FOR THEM TO GET INTO. WHAT IS THE

11 PASSWORD FOR? NOT TO LET IN YOUR COMPETITOR.

12 SO IN ADDITION TO THAT, WHAT THEY WERE ABLE TO GET,

13 BY SETTING UP THIS COMPANY MILLENNIUM SHOE, IS A CONFIDENTIAL

14 SALES PROPOSAL WHICH THEY THEN ALSO EXCERPTED AND PUT INTO THE

15 PRESENTATION, A EXACT DUPLICATE OF A CHART THAT HAD BEEN

16 PREPARED IN THE CONFIDENTIAL SALES PROPOSAL.

17 SO WE HAVE NOT JUST "I WENT INTO A CORNER OF THE

18 WEBSITE USING A PASSWORD" BUT POSING -- NEVER IDENTIFYING THAT

19 THIS WAS SOFTSCAPE, NEVER IDENTIFYING THAT IT WAS DAVE WATKINS,

20 BUT ELY VALLS SAYING "I'VE GOT TO HAVE THIS WITHIN TWO DAYS

21 BECAUSE I'M MAKING MY PURCHASE DECISION. I NEED TO HAVE YOUR

22 PROPOSAL." TAKE THE PROPOSAL. SHE GETS IT. GIVES IT TO DAVE.

23 DAVE AND/OR WHOEVER ELSE CUTS IT UP AND PUTS IT INTO THE

24 PRESENTATION.

25 SO WE NEED THE COMMUNICATIONS WITH ELY VALLS, WITH

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1 THE OTHERS THAT WE HAVE IDENTIFIED BY NAME, MILLENNIUM SHOE,
2 ET CETERA, IN OUR DOCUMENT REQUEST. WE THINK THAT THAT'S
3 SOMETHING THAT SHOULD BE FORTHCOMING IMMEDIATELY AND WITHOUT A
4 BUNCH OF OBJECTIONS AND NEGOTIATIONS. IT'S VERY OBVIOUSLY
5 RELEVANT TO WHAT'S HAPPENED HERE.

6 THE COURT: OKAY.

7 YOUR HONOR, MAY I BE HEARD ON THAT?

8 THE COURT: WELL, YEAH, I MEAN, MAYBE WE SHOULD JUST
9 HAVE A DEPOSITION OF WATKINS AND --

10 MR. PULGRAM: OH, ABSOLUTELY. WE'D LIKE TO GET THE
11 DOCUMENTS AND THEN DO THE DEPOSITION. OBVIOUSLY, I ASSUME HE'S
12 THE 30(B)(6) WITNESS IF HE'S AT THE CENTER OF THIS.

13 THE COURT: OKAY. SO YOUR THIRD CATEGORY, AGAIN, IS
14 WHAT THAT'S DIFFERENT FROM YOUR SECOND CATEGORY?

15 MR. PULGRAM: OF THE MATERIALS THAT I WANTED? SO I
16 WANTED THE --

17 THE COURT: JUST --

18 MR. PULGRAM: I'M TRYING TO KEEP TRACK OF THEM IN THE
19 WAY THAT YOUR HONOR IS.

20 WE WANTED THE COMMUNICATIONS INTERNALLY ABOUT THE
21 PREPARATIONS OF THE --

22 THE COURT: RIGHT. THAT WAS THE SECOND CATEGORY.

23 MR. PULGRAM: THAT'S THE SECOND. AND THE THIRD WAS
24 THE COMMUNICATIONS WITH ELY VALLS WITH --

25 THE COURT: WELL, THAT'S THE SAME AS THIS --

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1 MR. PULGRAM: -- WITH MR. CRUZ.

2 (SIMULTANEOUS COLLOQUY.)

3 THE COURT: -- SECOND -- YOU'RE TALKING ABOUT WRITTEN
4 COMMUNICATIONS.

5 MR. PULGRAM: EXACTLY. WITH MR. CRUZ.

6 THE COURT: WHO'S MR. CRUZ?

7 MR. PULGRAM: MR. CRUZ WAS THE PURPORTED CONSULTANT
8 WHO WAS ALLOWED --

9 THE COURT: OH.

10 MR. PULGRAM: -- TO LOG IN AND WHO PARTICIPATED IN
11 THE SALES MEETINGS, PURPORTEDLY.

12 THE COURT: SO THAT'S STILL IN THE CATEGORY OF
13 DOCUMENTS REGARDING THE PREPARATION OF THE PRESENTATION.

14 MR. PULGRAM: IT IS WITH -- IT IS ALSO WITH PEOPLE
15 OUTSIDE THE COMPANY, I GUESS, IS THE DIFFERENCE.

16 IN OTHER WORDS, THE PEOPLE INSIDE THE COMPANY WORKED
17 ON THE DOCUMENT. I WANTED TO MAKE SURE THAT WE ALSO HAVE THE
18 PEOPLE OUTSIDE LIKE MS. VALLS AND MR. CRUZ.

19 THE COURT: OKAY.

20 ALL RIGHT. WELL, MAYBE I SHOULD JUST TELL YOU
21 WHICH --

22 OKAY. SO THAT'S MY INCLINATION. SO EACH OF YOU MAY
23 ADDRESS BRIEFLY WHAT YOUR PROBLEM IS WITH WHAT I'VE SAID I'M
24 INCLINED TO DO.

25 MS. GRANT: WELL, I'LL WORK BACKWARDS FROM THE

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1 EXPEDITED DISCOVERY. FIRST OF ALL, I THINK WHAT HE JUST SAID
2 WAS ALL MERITS DISCOVERY --

3 THE COURT: IT DOESN'T MATTER.

4 MS. GRANT: WELL, I DON'T SEE THE BASIS FOR A --

5 THE COURT: IT'S NOT --

6 MS. GRANT: WELL, IT WOULD BE BECAUSE -- WE HAVEN'T
7 EVEN ANSWERED YET. SO IT'S MOVING EVERYTHING -- YOU KNOW, I
8 THINK THE LAST DAY TO DO THE RULE 26F CONFERENCE IS MAY 27TH.
9 SO IT'S ACTUALLY --

10 IF WE DO IT NEXT WEEK, I MEAN, INITIAL DISCLOSURES
11 AND EVERYTHING, THAT'S ACTUALLY -- TO BE HONEST, IT'S A BURDEN
12 FOR US. I MEAN, TO DO ALL OF THAT IN A WEEK. WE HAVE A HUGE
13 COMPANY WITH OFFICES ALL OVER THE WORLD, TO TRY AND GO AND GET
14 ALL OF THESE DOCUMENTS AS I MENTIONED, MR. WATKINS CREATED THIS
15 DOCUMENT WITH OTHER PEOPLE IN THE COMPANY OVER A YEAR, LONG
16 PERIOD.

17 SO THIS IS GOING TO PAST HARM. IT DOESN'T HAVE
18 ANYTHING TO DO WITH FUTURE IRREPARABLE INJURY, WHICH THEY
19 HAVEN'T EVEN ESTABLISHED IRREPARABLE INJURY. BUT I JUST DON'T
20 SEE HOW THINGS GOING TO WHAT HE DID OVER THE LAST YEAR, IT IS
21 MERITS DISCOVERY. AND I'M NOT SURE I UNDERSTAND THE BASIS FOR
22 EXPEDITING THAT AND MOVING AWAY FROM JUST THE REGULAR RULE 26
23 DISCOVERY.

24 YOU HAD MENTIONED THAT YOU WERE CONCERNED MORE IN
25 TERMS OF EXPEDITING THINGS ABOUT WHO DID THIS, SO IT'S NOT

1 REALLY LIKE WHO CREATED THE PRESENTATION, IT'S WHO DISSEMINATED
2 IT, AND AS I MENTIONED, YOU KNOW, THE SUBPOENAS FROM GOOGLE HAVE
3 SHOWN IT'S SOMEWHERE -- ORIGINATED SOMEWHERE IN SINGAPORE. WE
4 HAVE MIRROR-IMAGED THE INFORMATION THAT -- FROM PEOPLE WHO
5 HELPED CREATE THE DOCUMENTS.

6 BUT WE HAVE DONE EVERYTHING WE CAN INTERNALLY TO TRY
7 AND FIGURE OUT WHO GOT THIS -- WHO DISSEMINATED IT. COUNSEL'S
8 INCORRECT. THIS ACTUALLY WAS SENT OUT ON A WEB, SO IT'S NOT
9 LIKE A BUNCH OF PEOPLE GOT IT ON THEIR COMPUTERS. IT WAS MADE
10 ACCESSED THROUGHOUT THE COMPANY THROUGH THE WEB, SO EVEN --

11 THE COURT: THE WORLDWIDE WEB OR INTERNET?

12 MS. GRANT: THE INTERNET.

13 THE COURT: INTRANET.

14 MS. GRANT: INTRANET, YES, YOUR HONOR.

15 SO EVEN IF WE WENT AROUND AND MIRROR-IMAGED ALL OF
16 OUR -- THE SALES FORCE AROUND THE WORLD, WHICH WOULD BE
17 INCREDIBLY BURDENSOME AND COSTLY, IT WOULDN'T SHOW ANYTHING
18 BECAUSE THEY DIDN'T GET IT ON THEIR COMPUTER. THE ONLY WAY THEY
19 WOULD HAVE BEEN ABLE TO GET IT IS TO ACTUALLY CHECK IT OUT OF
20 THE SERVER. AND, UNFORTUNATELY, WE DON'T HAVE -- THE COMPANY
21 DOES NOT HAVE THAT TYPE OF CAPABILITY TO SEE WHO CHECKED THIS
22 PARTICULAR DOCUMENT OUT. SO --

23 THE COURT: HOW DO YOU KNOW THAT?

24 MS. GRANT: BECAUSE I -- THE COMPANY TALKED TO THEIR
25 I.T. PEOPLE. AND THAT WAS ONE OF FIRST QUESTIONS I ASKED, IS,

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1 DON'T YOU HAVE SOMETHING THAT YOU CAN SEE WHO CHECKS -- YOU
2 KNOW, LIKE CHECK IT OUT LIKE A LIBRARY, AND THEY SAID WE
3 DON'T -- WE DON'T HAVE THAT CAPABILITY. SO THAT WAS MY NUMBER
4 ONE QUESTION WHEN I FIRST STARTED WORKING ON THIS CASE.

5 THE COURT: WELL, THEN HOW CAN IT BE SHOWN WHO WITHIN
6 THE COMPANY ACCESSED THAT DOCUMENT?

7 MS. GRANT: BECAUSE -- IT CAN'T. THE ONLY PEOPLE WHO
8 ACCESSED IT WERE DAVE WATKINS AND A TINY GROUP OF PEOPLE IN
9 TERMS OF THE COMPANY. IN TERMS OF WHO GOT IT, IT WAS MADE
10 AVAILABLE GLOBALLY THROUGH OUR INTRANET ON THE INTERNET.

11 THE COURT: RIGHT. BUT HOW CAN IT BE SHOWN WHO
12 VIEWED IT OR DOWNLOADED IT?

13 MS. GRANT: IT CAN'T BE. THAT'S THE WHOLE POINT.

14 THE COURT: WELL, ALL RIGHT.

15 MS. GRANT: SO THE DISCOVERY THAT HE'S GOING FOR --
16 WE'RE GOING TO GO THROUGH A TREMENDOUS AMOUNT OF BURDEN AND
17 EXPENSE FOR SOMETHING THAT CANNOT EVEN BE SHOWN.

18 THE COURT: WELL, IT'S -- I'M NOT SURE THAT IT CAN'T
19 BE. WHAT, YOU'RE SAYING THAT EVEN ON THE COMPUTER OF THE PERSON
20 WHO DOWNLOADED IT, IT WOULDN'T SHOW?

21 MS. GRANT: IT COULD SHOW, FOR INSTANCE,
22 MR. WATKINS --

23 THE COURT: NO, NOT HIM. LET'S SAY I'M JOE SALESMAN
24 IN MASSACHUSETTS, AND I LOOKED -- LOGGED ON THE INTRANET AND I
25 LOOKED AT IT AND I DOWNLOADED IT TO MY COMPUTER, AND I

1 DELETED --

2 MS. GRANT: YOU CAN'T DOWNLOAD IT. THAT'S THE POINT.

3 IF IT HAD BEEN SOMETHING THAT YOU COULD HAVE

4 DOWNLOADED ONTO THE COMPUTER, I ABSOLUTELY AGREE WITH YOUR

5 HONOR. THERE WOULD BE A WAY TO FORENSICALLY GO BACK AND SEE WH

6 IT WAS.

7 BUT SIMPLY LOOKING AT IT ON THE WEB THROUGH THE

8 INTRANET, WATCHING IT, THE POWERPOINT AS IT GOES ALONG -- THEY

9 DIDN'T DOWNLOAD IT. IT WAS SOMETHING THAT WAS, LIKE --

10 THE COURT: HOW WOULD THEY GET IT?

11 MS. GRANT: THEY DIDN'T GET IT.

12 THE COURT: HOW DO THEY GET IT?

13 MS. GRANT: THEY DID NOT GET IT. THAT'S WHAT I'M

14 TRYING TO SAY. THERE WAS ONLY A SMALL GROUP --

15 THE COURT: COULD THEY PRINT A COPY?

16 MS. GRANT: THEY COULD HAVE PRINTED A COPY, BUT THEY

17 DID NOT DOWNLOAD IT.

18 THE COURT: AND WOULDN'T IT SHOW ON THEIR COMPUTER

19 THAT THEY PRINTED IT?

20 MS. GRANT: I DO NOT BELIEVE SO.

21 THE COURT: WELL, I THINK WE DO NEED, THEN, TO FIND

22 OUT HOW THAT -- WHETHER THAT WOULD SHOW UP.

23 MS. GRANT: RIGHT. AND I --

24 THE COURT: EVEN IF YOU CAN'T DOWNLOAD, YOU CAN,

25 LIKE, RIGHT CLICK AND PASTE IT AND COPY IT ON TO A .PDF OR

1 SOMETHING LIKE THAT.

2 MS. GRANT: UNFORTUNATELY, FROM MY UNDERSTANDING FROM
3 TALKING TO THE COMPANY'S I.T., THE -- JUST DOING EXACTLY WHAT
4 YOU JUST SAID, THERE IS NO WAY WITH OUR COMPANY'S COMPUTER
5 SYSTEMS TO TRACE THAT. IF YOU WANT TO DO A 30(B)(6) ON THAT,
6 THAT'S FINE. I UNDERSTAND THE EXPEDITED NATURE OF THAT.

7 BUT GOING BACK IN TIME TO ALL THE WAYS THAT DAVE AND
8 HIS TEAM GOT THIS PIECE OF INFORMATION AND THAT PIECE OF
9 INFORMATION TO CREATE IT, I DON'T SEE THAT, WHICH IS TRULY
10 MERITS DISCOVERY, GOES TO PAST HARM. I DON'T NECESSARILY SEE
11 THE EXPEDITED NATURE OF THAT, BECAUSE THAT'S GOING TO BE A HUGE
12 UNDERTAKING. I COMPLETELY UNDERSTAND THE NATURE FOR EXPEDITED
13 DISCOVERY ON HOW DID THIS GET OUT OF THE COMPANY.

14 BELIEVE IT OR NOT, WE ARE VERY INTERESTED IN DOING
15 THIS. THIS WAS NOT SOMETHING THAT WAS AUTHORIZED BY OUR
16 COMPANY. IT BLEW UP IN OUR FACE. AND, YOU KNOW, WHEN DAVE DID
17 ACCESS THEIR COMPUTER, IT'S PRETTY OBVIOUS. IT WAS HIM. I
18 MEAN, HE DIDN'T DO ANYTHING. HE ACCESSED IT. HE DIDN'T CREATE
19 A FAKE NAME OR A FAKE ADDRESS. THIS PERSON, WHOEVER THEY DID,
20 WENT TO A LOT OF TROUBLE TO CONCEAL HIS OR HER IDENTITY.

21 AND, REALLY, IN TERMS OF THE MERITS OF THIS CASE,
22 HOLDING SOFTSCAPE RESPONSIBLE UNDER RESPONDEAT SUPERIOR, YOU
23 HAVE TO SHOW IT WAS AN EMPLOYEE AND IT WAS WITHIN THE COURSE AND
24 SCOPE. AND I WOULD SUBMIT THAT DOING SOMETHING WITH A FAKE
25 NAME, FAKE EMAIL ADDRESS, AFTER HOURS, AND GOING TO ALL THESE --

1 SINGAPORE AND EVERYTHING ELSE IS CLEARLY NOT FORESEEABLE TO THE
2 COMPANY AND NOT WITHIN THE COURSE. AND SO THEIR CLAIMS FAIL --
3 NOT EVEN GETTING TO THE MERITS OF THEIR CLAIM. IT FAILS ON THAT
4 THRESHOLD QUESTION ALONE.

5 WE HAVE DONE EVERYTHING -- WE ARE DOING EVERYTHING WE
6 CAN TO TRY AND FIGURE THIS OUT BECAUSE, OBVIOUSLY, WE DON'T WANT
7 IT TO HAPPEN AGAIN. THIS COMPANY HAS USED THESE TYPES OF
8 PRESENTATIONS IN THE PAST. THIS HAS NEVER EVER HAPPENED, AND WE
9 DON'T KNOW HOW IT HAPPENED, AND WE'RE DOING EVERYTHING WE CAN TO
10 FIND OUT.

11 THE COURT: ALL RIGHT. DID YOU HAVE ANYTHING ELSE
12 YOU WANTED TO SAY --

13 MS. GRANT: I THINK --

14 THE COURT: -- ON THESE POINTS?

15 MS. GRANT: -- IN TERMS OF THE T.R.O., OF COURSE, WE
16 WERE GOING TO ASK FOR IT TO BE DISSOLVED BECAUSE I DON'T THINK
17 THERE'S ANY THREAT OF IRREPARABLE INJURY. THIS IS A SINGLE,
18 ISOLATED EVENT, WHICH THIS COURT HAS RECOGNIZED IS NOT ENOUGH TO
19 GIVE RISE TO A PRELIMINARY INJUNCTION. IT DEALS SOLELY WITH
20 PAST HARM AND --

21 THE COURT: WELL, I MIGHT HAVE HAD MORE SYMPATHY WITH
22 THAT ARGUMENT IF IT HADN'T BEEN FOR YOUR PRESS RELEASE WHICH
23 AFFIRMED THE TRUTH OF THINGS, SOME OF WHICH PRETTY CLEARLY
24 AREN'T TRUE, OR AT LEAST YOU HAVE NO REASON TO BELIEVE THEY ARE
25 TRUE.

1 SO IT SEEMS TO ME YOU KIND OF CONTINUED IT AND ARE

2 STILL CONTINUING IT SO --

3 MS. GRANT: WELL, I WILL SAY, YOUR HONOR, THAT THE

4 C.E.O. FEELS VERY STRONGLY -- THESE ARE BITTER COMPETITORS, AND

5 HE FEELS VERY STRONGLY, AS IS EVIDENCED IN HIS DECLARATION, THAT

6 THESE STATEMENTS -- THE TEN -- AND, AGAIN, I THINK IT'S REALLY

7 IMPORTANT TO TALK ABOUT -- IT'S -- OF 43 PAGES, THEY'VE ONLY

8 IDENTIFIED THAT THEY CLAIM ARE FALSE OR MISLEADING. AND OF

9 THOSE, SOME OF THEM ARE --

10 THE COURT: SO TEN ISN'T SO MANY FALSE STATEMENTS TO

11 MAKE ABOUT SOMEBODY?

12 MS. GRANT: BUT WHEN YOU ACTUALLY LOOK THROUGH THEM,

13 YOUR HONOR --

14 THE COURT: SOUNDS LIKE A LOT TO ME.

15 MS. GRANT: ONE OF THEM SAID SEARS ABANDONED A

16 PROJECT AFTER SIX MONTHS. THEY REBUTTED IT BY SAYING SEARS IS A

17 LOYAL CUSTOMER. THAT ACTUALLY IS NOT SAYING THAT SEARS DID NOT

18 ABANDON THAT PROJECT AFTER SIX MONTHS. ANOTHER ONE --

19 THE COURT: AND HOW DO YOU KNOW THEY DID?

20 MS. GRANT: BECAUSE THAT WAS WHAT WAS REPORTED TO OUR

21 C.E.O. FROM THE CUSTOMER.

22 THE COURT: BY WHO?

23 MS. GRANT: FROM THE CUSTOMER.

24 THE COURT: WHO?

25 MS. GRANT: SOMEONE AT SEARS.

1 THE COURT: WHO?

2 MS. GRANT: I DON'T OFF THE TOP OF MY HEAD KNOW WHO

3 IT IS. I APOLOGIZE, YOUR HONOR.

4 THE SECOND ONE I JUST WANT TO POINT OUT IS THEY SAY

5 THIS PAGE HAS A LOT OF DATA THAT YOU HAVE TO SCROLL THROUGH.

6 IT'S CONFUSING. I MEAN, THAT'S AN OPINION. I MEAN, THESE ARE

7 THINGS THAT ARE ACTUALLY NOT EVEN RISING -- THEY MADE IT SOUND

8 LIKE THIS WAS VICIOUS, SINISTER THINGS, VERY TOXIC. BUT WHEN

9 YOU ACTUALLY JUST SIT DOWN AND READ THE PRESENTATION --

10 THE COURT: I HAVE. IT'S A LOT ABOUT THE

11 FUNCTIONALITY AND CAPABILITY, AND THAT'S WHY 98 PERCENT IS --

12 THEY DON'T EVEN CHALLENGE.

13 SO OF THE 10, I MEAN, UNDER THIS COURT'S RULING IN

14 J.K. HARRIS -- WE HAVE A DECLARATION THAT REFUTES EACH ONE OF

15 THE STATEMENTS THAT CLAIMS --

16 THE COURT: NOT REALLY. HE SAYS HE BELIEVED THEM,

17 BUT HE DOESN'T SAY WHAT HIS BASIS FOR HIS BELIEF IS.

18 MS. GRANT: FOR WHICH STATEMENT? I MEAN, I THOUGHT

19 HE ACTUALLY DID FOR EACH STATEMENT SAY --

20 THE COURT: I DON'T THINK SO.

21 MS. GRANT: -- WHY HE BELIEVES IT'S TRUE.

22 THE COURT: THE FACT THAT THERE'S A LIST OF CUSTOMERS

23 ONE DAY AND A DIFFERENT LIST THE NEXT DAY DOESN'T NECESSARILY

24 MEAN THAT THEY LOST THOSE CUSTOMERS.

25 IT MIGHT MEAN THAT ARE THEY REVISED THEIR LIST TO PUT

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1 ONES THAT THEY THOUGHT WERE MORE IMPRESSIVE OR WHATEVER ELSE,
2 IT'S --

3 MS. LEVINE: FAIR ENOUGH.

4 THE COURT: -- REASONABLE INFERENCE.

5 MS. GRANT: IT'S QUANTITATIVE. HE BASICALLY LOOKED
6 ON ONE AND THERE WAS 20, LET'S SAY AND THE NEXT DAY THERE WAS
7 18. HE'D MADE AN OPINION THAT THAT -- THAT THEY HAD LOST
8 CUSTOMERS. AND -- I MEAN, IT'S AN OPINION. IT'S NOT A
9 MISLEADING -- IT'S NOT A FALSE STATEMENT OF FACT.

10 THE COURT: BUT STATED AS A FACT.

11 MS. GRANT: OKAY. I ACTUALLY THINK OF IT AS AN
12 OPINION, BUT OBVIOUSLY, WE THINK ABOUT IT DIFFERENTLY. BUT I
13 THINK THE IMPORTANT THING IS THAT THERE'S NO THREAT OF
14 IRREPARABLE INJURY. HE'S NOT -- HE HAS SENT AN EMAIL ACTUALLY
15 BEYOND THAT. IT'S EXHIBIT B TO HIS DECLARATION. WHERE HE SENT
16 AN EMAIL TO ALL EMPLOYEES ON MONDAY AFFIRMING AND REEMPHASIZING
17 THAT UNDER NO CIRCUMSTANCES SHOULD THIS INTERNAL DOCUMENT BE
18 USED OUTSIDE OF SOFTSCAPE.

19 THE COURT: YOU SAY AFFIRMING OR REAFFIRMING WHICH
20 IMPLIES THAT THERE WAS SOME SUCH INSTRUCTION EARLIER, BUT THAT
21 INSTRUCTION --

22 (SIMULTANEOUS COLLOQUY.)

23 MS. GRANT: -- CONFIRMING THERE ARE --

24 THE COURT: YOU KNOW, IT'S REAL HARD FOR THE COURT
25 REPORTER TO KEEP WRITING DOWN WHAT I'M SAYING IF YOU START

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1 TALKING WHILE I'M STILL TALKING.

2 (SIMULTANEOUS COLLOQUY.)

3 THE COURT: SHE'LL TRY TO WRITE WHAT I SAY AND NOT
4 WHAT YOU SAY, BUT IT MAKES IT HARD FOR HER TO HEAR WHAT I'M
5 SAYING.

6 SO I DIDN'T SEE ANYTHING CONTEMPORANEOUS WHEN IT WAS
7 FIRST DISTRIBUTED SAYING, PLEASE DON'T DISTRIBUTE THIS OUTSIDE
8 THE COMPANY. AND, FRANKLY, IT'S NOT THE SORT OF THING THAT
9 LOOKS LIKE AN INTERNAL DOCUMENT.

10 WHY WOULD YOU MAKE IT ON THEIR TEMPLATE? WHY WOULD
11 YOU PUT THEIR TRADEMARK ON SOMETHING YOU WERE SHOWING TO YOUR
12 EMPLOYEES? WHY WOULD YOU WRITE IT AS THOUGH IT WERE IN THE
13 THIRD PERSON? WHY WOULD IT BE ALL THESE GRAPHICS TO IMPRESS
14 YOUR OWN SALESPEOPLE? I MEAN, IT JUST LOOKS LIKE SOMETHING
15 THAT'S PREPARED TO GO OUTSIDE. AND IF YOU'RE GOING TO WRITE
16 SOMETHING THAT WOULD BE BAD FOR YOU IF IT DID GO OUTSIDE AND
17 THEN NOT UNDERTAKE THE KINDS OF CONTROLS THAT ARE NECESSARY TO
18 STOP IT FROM GOING OUTSIDE, WHICH THEY CLEARLY DIDN'T BECAUSE
19 WHOEVER DID THIS WAS AN EMPLOYEE OF YOURS, THAT IS OF CONCERN.

20 MS. GRANT: FAIR ENOUGH, YOUR HONOR. I DON'T THINK
21 THERE'S ANY EVIDENCE THAT IT'S A SOFTSCAPE EMPLOYEE.

22 THE COURT: WHO ELSE HAD ACCESS TO IT?

23 MS. GRANT: SOMEONE COULD HAVE -- IT COULD HAVE BEEN
24 A FORMER SOFTSCAPE EMPLOYEE THAT LEFT THE COMPANY AND NOW WORKS
25 FOR SUCCESSFACTORS. SOMEONE COULD --

1 THE COURT: -- GOT ON TO YOUR INTRANET HOW?

2 MS. GRANT: YOUR HONOR, THERE COULD BE -- I COULD
3 SPECULATE A VARIETY OF WAYS. IT COULD HAVE BEEN ON DAVE
4 WATKINS' DESK. A JANITOR COULD HAVE PICKED IT UP. THERE ARE A
5 LOT OF WAYS WE COULD SPECULATE, AND I'M NOT GOING TO SIT HERE
6 AND TRY AND THINK OF THEM ALL WHEN WE DON'T ACTUALLY HAVE THE
7 EVIDENCE.

8 BUT WHAT I THINK IS IMPORTANT IS THAT THERE IS NO
9 THREAT, ABSENT THE PRESS RELEASE, WHICH YOU AND I MIGHT -- MIGHT
10 THINK THAT WASN'T A GOOD IDEA, BUT HE FEELS VERY STRONGLY ABOUT
11 HIS COMPANY. IT'S A SMALL, PRIVATELY HELD COMPANY UP AGAINST A
12 BIG PUBLIC COMPANY. THEY'RE SPENDING LOTS OF MONEY TO TRY AND
13 DRIVE THEM OUT OF THE MARKETPLACE. AND HE FEELS VERY STRONGLY
14 THAT HE NEEDS TO DEFEND HIMSELF.

15 AND SO WHILE YOU AND I MIGHT DISAGREE ABOUT HIS PR
16 STRATEGY -- AND I WILL CERTAINLY PASS ALONG YOUR COMMENTS,
17 BELIEVE ME -- I DON'T THINK THAT THAT INDICATES A THREAT OF
18 CONTINUING OR ONGOING INJURY WHEN HE SPECIFICALLY TOLD THE SALES
19 FORCE "UNDER NO CIRCUMSTANCES SHOULD THIS EVER BE USED OUTSIDE
20 THE COMPANY." WHAT HE'S REAFFIRMING IS IT'S AN INTERNAL
21 DOCUMENT, WHICH IS HOW THEY'VE ALWAYS TALKED ABOUT IT, NOT JUST
22 THIS DOCUMENT BUT OTHER ONES THAT PRECEDED THIS ABOUT ALL THEIR
23 COMPETITORS.

24 AND I KNOW, AGAIN, IT MIGHT SEEM STRANGE TO YOU OR TO
25 ME THAT THEY WOULD DO THESE TYPES OF PRESENTATIONS. THAT IS HIS

1 WAY OF MOTIVATING HIS SALES FORCE, WHO FEEL VERY MUCH ATTACKED
2 BY THIS COMPANY.

3 AND, AGAIN, I MIGHT CHOOSE TO DO IT DIFFERENTLY, BUT
4 JUST LIKE THE 1-800-CONTACTS, THE USE OF ANOTHER COMPANY'S LOGO
5 OR TRADEMARK FOR INTERNAL DOES NOT -- IS NOT A VIOLATION OF THE
6 LAW. AND THIS WAS A PURELY INTERNAL DOCUMENT THAT REGRETTABLY
7 WAS LEAKED OR SOMEHOW GOT OUT OF THE COMPANY.

8 SO I JUST -- YOU KNOW, I DON'T SEE THE BASIS FOR
9 IRREPARABLE HARM UNDER THIS COURT'S PRIOR RULINGS IN J.K.
10 HARRIS, AND I WOULD JUST SUBMIT THAT THE T.R.O. SHOULD ACTUALLY
11 BE DISSOLVED OR SIGNIFICANTLY NARROWED. BECAUSE EACH TIME YOU
12 DO THE T.R.O. OR A PRELIMINARY INJUNCTION, THEY DO PRESS
13 RELEASES TRUMPETING YOUR RULINGS TO TRY AND USE IT TO A
14 COMPETITIVE ADVANTAGE.

15 SO THAT'S -- TO BE HONEST, THAT'S -- WAS THE -- I
16 THINK, THE GENESIS OF THE PRESS RELEASE WAS TO COUNTER THE ONE
17 WHERE THEY TRUMPETED, YOU KNOW, AH HA, THAT OUR CLIENT HAD
18 VIOLATED THE LAW AND ALL OF THESE THINGS THAT WERE IN THEIR
19 PRESS RELEASE.

20 THE COURT: OKAY. DID YOU WANT TO RESPOND BRIEFLY?

21 MR. PULGRAM: I WILL BRIEFLY.

22 FOR OUR PERSPECTIVE, THIS ISN'T ABOUT BITTER
23 COMPETITORS OR OUR EVER HAVING ATTACKED ANYONE. WE WERE
24 VICTIMIZED BY AN ATTACK.

25 I WANT TO TALK ABOUT DISCOVERY FIRST. THIS IS THE

1 EMAIL THAT WAS SENT OUT A FEW MINUTES BEFORE THE T.R.O. PAPER
2 WAS FILED BUT NOT DELIVERED TO YOUR HONOR WHEN THEY OPPOSED TH
3 T.R.O., AND THIS IS WHERE THEY TOLD THE SALESPEOPLE THE
4 INFORMATION CONTAINED IN THE DOCUMENT SHOULD BE USED JUDICIOUSL
5 IN COMPETITIVE SITUATION AS REQUIRED. THIS HAS NEVER BEEN
6 RESCINDED. THIS IS STANDING ORDERS AT THE COMPANY. THEY ARE
7 USED THIS AS A SCRIPT TO SELL.

8 AND WHY DO I SAY IT MATTERS FOR DISCOVERY?

9 BECAUSE THEY HAVE TO BE ABLE TO SEE THE SCRIPT? THEY
10 HAVE TO BE ABLE TO HAVE IT IN ORDER TO BE ABLE TO SELL OFF OF IT
11 AND TO MAKE THESE FALSE STATEMENTS THAT 63 PERCENT OF OUR
12 CUSTOMERS HAVE LEFT.

13 SO MY --

14 THE COURT: THEY DO HAVE IT. IT'S ON THEIR INTRANET,
15 I GUESS.

16 MR. PULGRAM: IT'S ON THEIR INTRANET, AND YET IT
17 CAN'T BE DOWNLOADED, THEY SAY. IT CAN'T BE PRINTED, THEY SAY.
18 YOU HAVE TO BE ON THE INTRANET WHENEVER YOU'RE IN THE
19 CONVERSATION WITH THE CUSTOMER. THIS MAY BE TRUE.

20 BUT THIS IS WHAT I ASK WITH RESPECT TO DISCOVERY: I
21 WOULD LIKE A DIRECTION THAT THE PARTIES MEET AND CONFER AND THAT
22 THEY DISCLOSE HOW AND WHERE THESE MATERIALS ARE STORED, BY WHA
23 SORT OF TECHNOLOGY SO THAT WE CAN LOOK AND SAY, OH, IT'S A
24 MICROSOFT SHAREPOINT. WE CAN FIND OUT WHETHER OR NOT THERE
25 ACTUALLY IS SOME SORT OF RECORD THAT MIGHT PRESERVE WHO ACCESS

1 IT AND WHY. WHAT KIND OF RECORD WOULD BE GENERATED BY THOSE
2 ACCESSING IT.

3 SO I BELIEVE IT'S APPROPRIATE OFF THE BAT IN ORDER TO
4 PRESERVE DISCOVERY TO FIND OUT HOW YOU FIND THIS INFORMATION AND
5 USE IT TO -- TO IDENTIFY HOW THIS MATERIAL IS STORED AND HOW
6 IT'S MADE AVAILABLE. AND THAT WOULD INCLUDE ALL PROCESSES BY
7 WHICH THIS HAS HAPPENED WITHIN THE COMPANY.

8 FROM THAT, WE SHOULD BE ABLE TO IDENTIFY WHETHER
9 THERE'S FURTHER PRESERVATION EFFORTS THAT ARE NEEDED.

10 SECOND, WE AGREE, OF COURSE, WITH THE PRESS RELEASE
11 POINT. AND IN PARTICULAR, WHAT WAS STRIKING TO US WAS THAT
12 AFTER THE PRESS RELEASE WENT OUT, AN EMAIL WENT OUT TO THE
13 CUSTOMERS THAT ATTACHED THE REFERENCE TO THE PRESS RELEASE SO
14 THAT -- YOUR HONOR, WE NOW KNOW 776 EMAIL ADDRESSES RECEIVED
15 THIS -- THIS -- THAT'S THE NUMBER THAT WE GOT FROM GOOGLE. 776
16 DIFFERENT EMAIL ADDRESSES OF INDIVIDUAL SALESPEOPLE.

17 AND IF YOU LOOK AT EXHIBIT B TO THE SUPPLEMENTAL THAT
18 WE'VE TURNED IN WHICH WAS THE GOOGLE PRODUCTION, THAT'S WHAT YOU
19 SEE. THERE WAS A REFERENCE THAT THE ACCOUNT WAS OPENED IN
20 SINGAPORE, AND THAT'S TRUE. THE GOOGLE -- THE GMAIL ACCOUNT WAS
21 INITIALLY OPENED BY AN IP ADDRESS PURPORTING TO BE FROM
22 SINGAPORE.

23 BUT, AS YOU MAY KNOW, YOU CAN SPOOF OR USE PROXIES TO
24 CLAIM AN IP ADDRESS THAT YOU'RE NOT ACTUALLY USING. WHAT WE
25 KNOW IS THAT AT 10:02 ON THE NIGHT THAT THESE EMAILS WERE SENT

1 OUT AT 9:51 AND 9:54, THE ADDRESS LIST WAS SO BIG YOU COULDN'T
2 DO IT ALL AT ONCE.

3 AT 10:02, THERE'S A LOG-IN FROM THE MARRIOTT,
4 10 MILES FROM THEIR CORPORATE HEADQUARTERS. NOW, IT WAS -- THE
5 GMAIL WAS PURPORTEDLY SET UP -- JUST THE ACCOUNT SET UP IN
6 SINGAPORE THROUGH ONE IP. BUT SOMEBODY AT THAT IP ADDRESS TEN
7 MINUTES LATER KNEW TO GO THERE. AND WHETHER IT WAS THE SAME
8 PERSON HAVING SPOOFED AN IP ADDRESS IN SINGAPORE OR JUST BEING
9 COMPLICIT, THAT'S THE INFORMATION THAT WE THINK WE'RE ENTITLED
10 TO FIND OUT.

11 WITH RESPECT TO THE -- THE ASPECTS OF WHETHER OR NOT
12 HIS DECLARATION ACTUALLY HAS ANY PERSONAL KNOWLEDGE, WE DO
13 BELIEVE THAT IT LACKS PERSONAL KNOWLEDGE. MR. WATKINS IS
14 OBVIOUSLY A SAVVY PERSON. HE IS NOT THE C.E.O. OF
15 SUCCESSFACTORS. HE DOES NOT KNOW WHAT SUCCESSFACTORS DOES. I
16 IS NOT THE C.E.O. OF, SUCCESSFACTORS' CUSTOMERS. HE DOES NOT
17 KNOW WHAT THOSE CUSTOMERS THINK. HE CANNOT, BY SIMPLY SAYING "I
18 HAVE PERSONAL KNOWLEDGE," SOMEHOW TAKE AWAY AND RAISE NOW AN
19 ARGUMENT ABOUT THE FALSITY OF THESE STATEMENTS.

20 AND I WOULD MAKE ONE PARTICULAR POINT ABOUT THAT.
21 HIS DECLARATION CAME IN NINE DAYS AFTER YOUR HONOR HAD ORDERED
22 THEIR RESPONSE, ALMOST A WEEK AFTER OUR REPLY BRIEF HAD BEEN
23 FILED. WITHOUT ANY EXPLANATION WHY THE AUTHOR WHO FINALLY IS
24 PREPARED TO CONCEDE, BECAUSE HE'S BEEN CAUGHT, THAT HE'S THE
25 AUTHOR OF THIS PRESENTATION WITHOUT ANY EXPLANATION FOR WHY HE

1 COULDN'T PUT IN A DECLARATION ON TIME.

2 TO EVEN CONSIDER THAT DECLARATION WOULD BE
3 FUNDAMENTALLY UNFAIR BECAUSE WE'VE HAD NO OPPORTUNITY EITHER AS
4 A LEGAL OR AS A FACTUAL MATTER TO RESPOND TO IT. WE PUT IN
5 EVIDENTIARY OBJECTIONS BECAUSE WE NEED TO PRESERVE -- WE THINK
6 THAT THEY'RE WELL TAKEN -- BUT THE DECLARATION SHOULDN'T BE
7 CONSIDERED AT ALL. THAT PARTICULAR ARGUMENT WAS WAIVED
8 SPECIFICALLY IN THEIR OPPOSITION AT PAGE 12, LINE 19, WHERE THEY
9 SAID, "ALTHOUGH SUCCESSFACTORS SPEND CONSIDERABLE EFFORT TRYIN
10 TO DEMONSTRATE THAT THE PRESENTATION IS FALSE, THAT ISSUE IS
11 IRRELEVANT FOR PURPOSES OF DETERMINING WHETHER A PRELIMINARY
12 INJUNCTION SHOULD ISSUE."

13 FALSITY IS NOT -- SHOULD NOT BE AT ISSUE BECAUSE IT
14 WAS RAISED AT 6:24 LAST NIGHT FOR THE FIRST TIME IN THIS CASE.
15 AND IT WOULDN'T BE FAIR TO EVEN PARSE THAT DECLARATION FOR WHAT
16 IS OR IS NOT WITHIN HIS PERSONAL KNOWLEDGE.

17 WHAT -- WHAT THIS PRESENTATION REMINDS ME OF IS THE
18 SWIFT BOATS (SIC) CAMPAIGN WHERE NEGATIVE ADVERTISING WAS
19 TARGETED AND RUN ONLY A FEW TIMES AFTER ALL IN THE ELECTION
20 CAMPAIGN FOUR YEARS AGO. BUT IT WAS REPEATED OVER AND OVER IN
21 THE MEDIA. IT WAS VERIFIED BY THOSE PEOPLE AGAIN AND AGAIN. IT
22 WAS RECIRCULATED AND ORALLY TRANSMITTED CONTINUALLY --
23 CONTINUOUSLY. AND THE ONGOING DAMAGE FROM THAT TO GOODWILL AN
24 TO YOUR PROSPECTS IS IMPOSSIBLE TO RECOVER FROM.

25 THIS IS IRREPARABLE HARM, AS HAS BEEN RECOGNIZED IN

1 ALL THE CASES WHERE GOODWILL IS AT STAKE. AND OUR GOODWILL IS
2 DIRECTLY AT STAKE AS A RESULT OF THE SORTS OF CHALLENGES TO
3 INTEGRITY AND CUSTOMER SATISFACTION.

4 I WOULD -- I DON'T THINK THAT WE HAVE ANY DISPUTE
5 ULTIMATELY AS TO WHETHER OR NOT THERE'S A COMPUTER FRAUD AND
6 ABUSE ACT CLAIM. THERE'S A CLAIM THAT'S PASSWORD-PROTECTED SITE
7 BUT NOTHING IN THE RECORD HERE.

8 THE TESTIMONY OF COUNSEL TODAY DOESN'T -- ISN'T EVEN
9 INCLUDED IN MR. WATKINS' LATE DECLARATION AS TO HOW HE GOT THIS
10 INFORMATION, WHETHER HE'S CHAIRMAN OF SOME COMPANY CALLED
11 MILLENNIUM SHOE. NONE OF THAT'S BEEN INTRODUCED.

12 ALL WE HAVE ON THE RECORD IS THE FACT THAT IT'S
13 UNDISPUTED THAT SUCCESSFACTORS IP ADDRESS LOGGED INTO OVER AND
14 OVER AGAIN THIS PASSWORD-PROTECTED SITE.

15 WE -- I WOULD FINALLY TALK BRIEFLY ABOUT THE SCOPE OF
16 INJUNCTION BECAUSE I THINK IT'S IMPORTANT. I THINK THAT IT
17 NEEDS TO BE VERY EXPLICIT HERE IN REACHING COMMUNICATION OF THE
18 CONTENT BY ANY MEANS, NOT JUST REPUBLICATION OF THE
19 PRESENTATION.

20 I THINK THAT IT'S IMPORTANT --

21 THE COURT: WELL, NOT ALL THE CONTENT, ONLY THE FALSE
22 STATEMENTS.

23 MR. PULGRAM: THE FALSE CONTENT. EXACTLY.

24 AND BY THE WAY, THE IDEA THAT TEN SLIDES HERE ARE
25 FALSE IS NOT TRUE. FROM THE OUTSET, WE HAVE SAID THIS ENTIRE

1 PRESENTATION IS, AS A WHOLE, FALSE BECAUSE IT PURPORTS TO HAVE
2 BEEN WRITTEN BY CUSTOMERS RATHER THAN IDENTIFYING ITS TRUE
3 AUTHOR.

4 THE COURT: WELL, NOT ALL OF IT DOES.

5 MR. PULGRAM: WELL, THE BEGINNING SAYS THIS HAS BEEN
6 PREPARED AS STATEMENTS BY CUSTOMERS. AND SO THE OVERALL OUTPU
7 OF IT IS DESCRIBED AS BEING FROM CUSTOMERS.

8 I THINK THE SECOND ASPECT OF INJUNCTIVE RELIEF IS WE
9 THINK IT DOES NEED TO REACH ANY REAFFIRMATION OR ENDORSEMENT OR
10 REFERENCE TO THE PRESENTATION AS A WHOLE OR TO ANY OF THE FALSE
11 CONTENT IN IT.

12 WE THINK, AS IN J.K. HARRIS, NEEDS TO REACH ALL
13 EMPLOYEES AND PERSONS ACTING IN CONCERT. AND WE THINK THAT IT
14 NEEDS TO BE SERVED ON EMPLOYEES BECAUSE WE DON'T WANT TO COME
15 BACK AND HEAR NEXT TIME ABOUT PEOPLE EITHER CONTINUING TO MAKE
16 THESE STATEMENTS OR ABOUT PEOPLE WHO HAVE BY MISTAKE LET IT OUT
17 AGAIN, THAT THEY DIDN'T KNOW.

18 AND, YOUR HONOR, RULE 65 PROVIDES THAT YOU HAVE THE
19 POWER, AND WE BELIEVE, AS IN J.K. HARRIS, SHOULD ENJOIN ALL
20 THOSE ACTING IN CONCERT WITH THE DEFENDANTS AS WELL AS THEIR
21 EMPLOYEES.

22 WE -- I DON'T THINK THAT IT'S NECESSARY TO BELABOR
23 THE RESPONDEAT SUPERIOR POINT WHERE THERE'S NO EXPLANATION OTH
24 THAN THAT THIS CAME FROM AN EMPLOYEE, WHERE THE -- THE C.E.O. OF
25 THE COMPANY DELIVERED IT TO SALES EMPLOYEES WITHOUT ANY APPAREN

1 RESTRICTIONS THAT WE'VE BEEN ABLE TO GET IN THE RECORD, WHERE IT
2 IS OBVIOUSLY DESIGNED TO FACILITATE SALES.

3 THIS IS NO MORE OUTSIDE THE SCOPE OF THE DUTY OF
4 THESE SALESPeOPLE THAN WHEN A DELIVERY DRIVER DRIVES TOO FAST
5 AGAINST COMPANY POLICY. SURE, THEY WEREN'T AUTHORIZED TO GO 60
6 IN A 40 ZONE, BUT THEY STILL ARE LIABLE IN RESPONDEAT SUPERIOR.

7 THE SAME'S TRUE WHEN A STOCK BROKER SELLS EXTRA HARD
8 EVEN THOUGH HE'S NOT AUTHORIZED TO TELL FALSEHOODS. MERRILL
9 LYNCH IS STILL GOING TO BE RESPONSIBLE IN RESPONDEAT SUPERIOR
10 FOR HIS CONDUCT.

11 THE PURPORTED LACK OF AUTHORITY DOESN'T TAKE THIS OUT
12 OF THE SCOPE OF THE DUTY OF THOSE PEOPLE WHO WERE ACTING.

13 IF YOU HAVE ANY OTHER QUESTIONS, I'D BE HAPPY TO
14 ANSWER THEM.

15 THE COURT: NO.

16 YOU MAY REPLY VERY BRIEFLY.

17 MS. GRANT: THANK YOU, YOUR HONOR.

18 I JUST WANT TO TALK ABOUT THE CONSTITUTIONAL
19 IMPLICATIONS ABOUT WHAT THEY'RE SEEKING. FIRST OF ALL, IN THE
20 T.R.O., YOU ACTUALLY, BASED ON THE DECLARATION OF SUSAN MOORE,
21 THE GENERAL COUNSEL, SAYING THAT SOFTSCAPE HAS NO INTENTION TO
22 RELEASE ON THE INTERNET OR OTHERWISE PUBLISH EXTERNALLY THE
23 PRESENTATION, YOU SAID, THEREFORE, THE COURT NEED NOT GRANT
24 PLAINTIFF'S REQUEST THAT THIS ORDER ENJOIN DEFENDANT FROM
25 PUBLISHING, CIRCULATING, EMAIL -- MAKING AVAILABLE OR OTHERWISE

1 DISTRIBUTING THE PRESENTATION.

2 AND I THINK WE ACKNOWLEDGE THAT THIS IS -- THERE'S A
3 LOT OF THINGS IN THIS PRESENTATION. AND BASED ON THIS COURT'S
4 EARLIER HOLDING IN J.K. HARRIS VS. CASTLE, AN INJUNCTION THAT
5 PROHIBITS UNTRUE, MISLEADING, OR FALSE STATEMENTS IS TOO
6 OVERBROAD.

7 THE COURT: NO, I'M GOING TO SPECIFY WHICH
8 STATEMENTS --

9 MS. GRANT: OKAY.

10 THE COURT: -- HAD NOT BEEN SHOWN TO BE TRUE.

11 MS. GRANT: RIGHT. AND I THINK --

12 THE COURT: AND YOU MAY NOT DISTRIBUTE ANY STATEMENTS
13 THAT ARE FALSE OR THAT YOU CAN'T SHOW ARE TRUE, NO MATTER HOW
14 SINCERELY YOU BELIEVE THEM TO BE TRUE IF THEY'RE STATEMENTS OF
15 FACT. AND YOU CAN'T SUBMIT SOMETHING THAT PURPORTS TO BE FROM
16 SOMEONE THAT IT ISN'T FROM.

17 MS. GRANT: I -- UNDERSTOOD.

18 THE COURT: AND IF I SAY SOMETHING IS FALSE THAT YOU
19 REALLY THINK IS TRUE, AND YOU WANT TO COME OUT AND BRING YOUR
20 GUY FROM SEARS IN AND HAVE THEM CALL HIM AND SAY, "YEAH, HERE'S
21 WHAT I THINK, AND HERE'S WHAT I SAID," YOU KNOW, WE'LL TAKE THAT
22 ONE OFF.

23 MS. GRANT: OKAY. I WAS ONLY -- MENTIONED THAT
24 'CAUSE HE -- HE REITERATED HIS REQUEST TO HAVE AN INJUNCTION
25 AGAINST ANY USE OF ANYTHING THAT'S IN THE PRESENTATION. AND I

1 THINK UNDER J.K. --

2 THE COURT: NO, I DON'T -- WELL, THAT'S NOT WHAT I

3 UNDERSTOOD HIM TO SAY AND THAT'S NOT WHAT I'LL DO.

4 MS. GRANT: OKAY.

5 ALSO ABOUT THE WATKINS DECLARATION, THEY MOVED TO

6 STRIKE ALL OF OUR EVIDENCE THAT WAS ATTACHED TO THE DECLARATION

7 OF SUSAN MOORE. SO, OBVIOUSLY, GIVEN THE EXTRAORDINARY RELIEF

8 SOUGHT AND THE EXPEDITED NATURE OF THE PROCEEDINGS, WE MOVED TO

9 PUT ADDITIONAL EVIDENCE THAT WE THOUGHT WAS RELEVANT BEFORE THE

10 COURT.

11 AND IN YOUR HOLDING, I THINK, IN 2002 IN THE METRO

12 CASE, YOU CONSIDERED A SUPPLEMENTAL MEMORANDUM THAT HAD BEEN

13 FILED AFTER THE HEARING EVEN THOUGH IT DIDN'T COMPLY WITH RULE

14 7-3D, AND JUST GIVEN THE EXTRAORDINARY RELIEF HERE AND THE FACT

15 THAT THEY MOVED TO STRIKE, WE'RE ENTITLED TO OPPOSE A MOTION TO

16 STRIKE, AND WE PUT IN EVIDENCE --

17 THE COURT: I DON'T WANT TO FIGHT ABOUT WHAT EVIDENCE

18 IS WHAT. I'VE READ EVERYTHING, AND I'M GOING TO DO THE BEST I

19 CAN WITH WHATEVER I SEE, TAKING INTO ACCOUNT HOW LONG PEOPLE HAD

20 TO OPPOSE IT AND WHAT IT'S BASED ON AND ALL OF THAT. I'M NOT

21 GOING TO PARSE OUT EVERY LINE OF EVERY PIECE OF PAPER I GOT.

22 MS. GRANT: AND WITH REGARD TO THE DISCOVERY, I

23 THINK -- I UNDERSTAND THE NEED FOR EXPEDITED DISCOVERY IN TERMS

24 OF GETTING TO THE BOTTOM OF WHO DID THIS. AND I AM MORE THAN

25 HAPPY TO WORK WITH THEM TO TRY -- AND WE HAVE NOT -- WE HAVE NOT

1 OPPOSED ANY OF THEIR SUBPOENAS. WE'VE WORKED -- WE WORKED ALL
2 LAST WEEKEND TRYING TO COME UP WITH PROTECTIVE ORDERS AND
3 EVERYTHING. WE'VE BEEN WORKING WITH THEM, AND I WILL CONTINUE
4 TO DO SO BECAUSE I DO THINK THAT THAT'S RELEVANT, NOT JUST FOR
5 THE COURT BUT FOR US, TOO.

6 BUT THIS BROADER MERITS DISCOVERY, ABOUT, YOU KNOW,
7 HOW DID THE DOCUMENT GET CREATED -- 'CAUSE REALLY THE ISSUE HERE
8 IS DISSEMINATION. WHO DISSEMINATED THIS DOCUMENT? HOW IT WAS
9 CREATED? AND WHO HE TALKED TO AT SEARS AND ALL OF THESE KIND OF
10 THINGS I THINK ARE REALLY NOT THINGS THAT SHOULD BE ON AN
11 EXPEDITED BASIS EVEN BEFORE WE'VE ANSWERED.

12 SO I WOULD JUST ASK THAT IF WE'RE GOING TO EXPEDITE
13 THE INITIAL DISCLOSURES AND THE 26F CONFERENCE, THAT WE JUST AT
14 LEAST HAVE AN OPPORTUNITY TO RESPOND TO THE COMPLAINT, WHICHEVE
15 WAY WE DECIDE TO RESPOND. AND THEN SHORTLY THEREAFTER, FOR
16 MERITS-TYPE DISCOVERY, WE COULD MOVE THAT --

17 THE COURT: WELL, HOW THE DOCUMENT WAS CREATED AND
18 WHO WAS RESPONSIBLE FOR IT IS ALSO SOMETHING THAT COULD
19 DISSIPATE. ACCESS TO THEIR WEBSITE, WHO HAD ACCESS, HOW WAS IT
20 ACCESSED, WHICH PAGES WERE ACCESSED, AND ALL THOSE SORTS OF
21 THINGS ARE THINGS THAT COULD BE EPHEMERAL.

22 MS. GRANT: THEN MAYBE THE SOLUTION WOULD BE RATHER
23 THAN SOME -- I'M REALLY THINKING THE DIFFERENCE BETWEEN, LIKE, A
24 30(B)(6) DEPOSITION, WHICH I THINK WOULD ANSWER A LOT OF THESE
25 QUESTIONS, VERSUS, YOU KNOW, A PRODUCTION OF A VOLUMINOUS AMOUNT

1 OF DOCUMENTS FROM MANY PEOPLE INCLUDING INITIAL DISCLOSURES.

2 SO MAYBE WE COULD DO IT FIRST BY DEPOSITION AND THEN
3 SAVE THE DOCUMENTS, WHICH I THINK IS GOING TO BE A LOT MORE
4 CUMBERSOME TO DO THAT ON AN EXPEDITED BASIS BEFORE EVEN
5 RESPONDING TO THE COMPLAINT, WHEN REALLY THAT DEALS WITH MOSTLY
6 MERITS.

7 THERE'S NO THREAT THAT THAT'S GOING TO BE DESTROYED.
8 AS I REPRESENTED TO THE COURT, THE BACKUP TAPES ARE BEING --
9 WELL, THAT'S ACTUALLY A DECLARATION.

10 THE BACKUP TAPES HAVE BEEN PULLED OUT OF RECYCLING,
11 AND THE -- ANYONE WHO HELPED CREATE THAT DOCUMENT, THEIR
12 COMPUTERS HAVE BEEN IMAGED, AND THOSE IMAGES ARE UNDER LOCK AN
13 KEY. SO THERE'S NO DANGER THAT THAT DATA IS GOING TO BE LOSS.

14 THE COURT: OKAY.

15 WELL, WHAT I'M DEBATING HERE IS WHETHER TO DO INITIAL
16 DISCLOSURES AND MAYBE -- MAYBE WE SHOULD JUST NOT EXPEDITE THE
17 INITIAL DISCLOSURES BUT JUST OPEN UP REGULAR DISCOVERY. AND
18 THAT WAY YOU COULD DO MORE FOCUSED REGULAR DISCOVERY RATHER T
19 THE BROADER INITIAL DISCLOSURES. THAT MIGHT BE BETTER FOR THIS
20 SITUATION.

21 MR. PULGRAM: YOUR HONOR, WE WOULD -- WE WOULD BE
22 OKAY WITH THAT IDEA, AS LONG AS IT WAS UNDERSTOOD THAT THOSE
23 CATEGORIES THAT WE DISCUSSED BEFORE, THOSE THREE OR FOUR
24 CATEGORIES, ARE THINGS THAT ARE GOING TO BE PRODUCED FORTHWITH
25 AND THAT --

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1 THE COURT: YOU CAN PUT IN A DOCUMENT REQUEST, AND
2 WHAT'S THE TURNAROUND ON THAT? USUALLY 30 DAYS?

3 MR. PULGRAM: WELL, USUALLY 30 DAYS TO GET YOUR
4 OBJECTIONS TO GET NOTHING.

5 MS. GRANT: WELL --

6 MR. PULGRAM: NOW, LET ME TALK FOR A SECOND -- LET ME
7 TALK FOR A SECOND ABOUT PURPORTED COOPERATION HERE.

8 WE'VE BEEN ASKING SINCE THE DAY WE FILED THIS
9 COMPLAINT FOR AN EARLY MEETING TO TALK ABOUT DISCOVERY. WE'VE
10 BEEN TOLD WE WILL NOT MOVE -- WE WILL NOT MOVE THE EARLY MEETING
11 OF COUNSEL FULL STOP, PERIOD, NO DISCUSSION. AND THAT IS WHERE
12 WE HAVE BEEN.

13 WE HAVE GOTTEN NO COOPERATION TO TRY TO NARROW IT, TO
14 DO EXPEDITED IN ANY KIND OF WAY. AND UNTIL THE DISCOURSE HERE
15 TODAY ABOUT WHAT MATERIALS HAVE BEEN PRESERVED AND A RESPONSE
16 ONE LETTER THAT I WROTE ABOUT DAVE WATKINS, WE HADN'T RECEIVED
17 ANY INFORMATION ABOUT WHAT HAD OR HAD NOT BEEN PRESERVED.

18 THE COURT: OKAY. WELL, MAYBE WHAT WE SHOULD DO IS
19 HAVE YOU STAY AFTER COURT RIGHT NOW WITH -- AND TALK TO EACH
20 OTHER ABOUT A DISCOVERY PLAN; HAVE YOU MEET TOMORROW IN A MEET
21 AND CONFER WITH YOUR TOP I.T. PERSON, AND YOU CAN BRING SOME
22 EXPERT WHO KNOWS WHAT HUMMINGBIRDS AND THINGS ARE.

23 MR. PULGRAM: YEP.

24 THE COURT: AND YOU CAN HAVE AN INFORMAL DISCUSSION
25 WHERE YOUR PERSON DESCRIBES HOW THE WHOLE THING WORKS SO THAT

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1 YOU CAN PERHAPS COME UP WITH SOME JOINT PLAN FOR PRESERVING OR
2 DISCOVERING WHAT MIGHT BE EPHEMERAL ON YOUR PEOPLE'S COMPUTER;

3 AND IF YOU AREN'T ABLE TO AGREE ON SOMETHING, THEN
4 YOU'D AT LEAST BE IN A BETTER POSITION TO KNOW WHAT TO ASK FOR
5 IN TERMS OF PRESERVING WHAT MIGHT BE ON THE VARIOUS COMPUTERS.

6 MR. PULGRAM: I THINK THAT WOULD BE A VERY
7 WORTHWHILE --

8 (SIMULTANEOUS COLLOQUY.)

9 THE COURT: AND THEN NEXT UP WILL BE -- WE'LL HAVE
10 OUR -- THE REAL MEET-AND-CONFER, A MORE -- MORE FULSOME
11 MEET-AND-CONFER INITIAL MEETING, OR WHATEVER IT IS WE CALL IT.
12 I THINK APRIL 10TH THE PLAINTIFF SUGGESTED IS A PERFECTLY GOOD
13 DATE FOR THAT.

14 AND THE GOAL THERE WOULD BE TO COME UP WITH SOME
15 EARLY DOCUMENT PRODUCTION, MAYBE NOT EVERY LAST DOCUMENT FROM
16 EVERY OUTPOST OF THE COMPANY IN THE WORLD BUT THINGS THAT YOU
17 KNOW ARE GOING TO BE TURNED OVER SOMETIME.

18 YOU MIGHT AS WELL JUST BITE THE BULLET AND TURN THEM
19 OVER NOW, AND THEN SOME EARLY 30(B)(6) DEPOSITIONS OF WATKINS
20 AND ELY AND MAYBE THE I.T. PERSON.

21 MS. GRANT: AND THIS DISCOVERY GOES BOTH WAYS, 'CAUSE
22 I MEAN, OBVIOUSLY, IT'S CRITICAL TO US TO PROVE THE TRUTH OF
23 SOME OF THIS TO GET SOME DISCOVERY FROM THE OTHER SIDE.

24 THE COURT: YOU -- DISCOVERY IS OPEN AS OF NOW. YOU
25 CAN BOTH TAKE --

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1 MS. GRANT: YES.

2 THE COURT: -- DISCOVERY.

3 MR. PULGRAM: SO TO RECAP, DISCOVERY'S NOW OPEN, MEET

4 AFTERWARDS TO BEGIN THE DISCUSSIONS OF A DISCOVERY PLAN,

5 TOMORROW WITH I.T. PEOPLE TO UNDERSTAND HOW THE DOCUMENT IS

6 PRESERVED AND AVAILABLE ON THEIR NETWORK AND WHAT RECORDS MAY

7 EXIST AROUND THAT; APRIL 10TH FOR THE FULL 26F CONFERENCE. AND

8 AT THAT TIME TO TRY TO IDENTIFY PROMPT AREAS THAT WILL BE

9 PRODUCED IMMEDIATELY AND 30(B)(6) AREAS.

10 THE COURT: RIGHT.

11 MR. PULGRAM: OKAY.

12 THE COURT: AND IF SOMEBODY FEELS LIKE THEY'RE

13 GETTING STONEWALLED AT THAT POINT, THEN YOU CAN -- I USUALLY

14 SEND THE DISCOVERY TO A MAGISTRATE JUDGE, BUT I SUPPOSE SINCE I

15 KNOW ABOUT IT, I'D BETTER JUST DO IT MYSELF, SO --

16 MR. PULGRAM: AS YOU WISH.

17 THE COURT: -- WHY DON'T EACH OF YOU SUBMIT A

18 FIVE-PAGE BRIEF EXPLAINING WHY YOU WEREN'T ABLE TO REACH A

19 DISCOVERY PLAN, WHAT YOU DID AGREE TO, AND WHAT YOU DIDN'T AGREE

20 TO, THAT YOU THINK YOU ABSOLUTELY NEED ON SOME EXPEDITED BASIS.

21 MS. GRANT: AND WHEN WOULD YOU LIKE TO HAVE THAT TO

22 BE SUBMITTED?

23 THE COURT: OH, TWO DAYS AFTER APRIL 10TH.

24 MS. GRANT: OKAY.

25 I DON'T HAVE A CALENDAR. IS THAT STILL IN THE

1 WEEKDAY OR --

2 MR. PULGRAM: THAT'S A MONDAY PROBABLY.

3 MS. GRANT: YES.

4 MR. PULGRAM: ACTUALLY, THE 10TH WILL BE A THURSDAY.

5 THE COURT: SO YOU CAN SUBMIT IT BY MONDAY THE 14TH.

6 MS. GRANT: OKAY.

7 THE COURT: AND WHEN I SAY DISCOVERY'S OPEN, I DON'T

8 MEAN LET'S ALL DUMP EACH OTHER WITH THE MOST BURDENSOME THINGS

9 WE CAN THINK OF TO STOP EVERYBODY IN THEIR TRACKS.

10 I'M SAYING BOTH OF YOU START DOING THE THINGS THAT

11 YOU NEED TO DO TO SOLVE THE MOST PRESSING PROBLEMS --

12 MS. GRANT: RIGHT.

13 THE COURT: -- WHICH ISN'T TO SAY WE'RE GOING TO

14 SLICE AND DICE AND SAY, OH, THERE IS MERITS, IF SOMEBODY'S THERE

15 BEING ASKED ABOUT SOMETHING, YOU KNOW, WE'RE NOT GOING TO

16 START -- WE DON'T NEED TO START TRYING TO PARSE IT OUT TOO

17 QUICKLY, BUT -- OR TOO FINELY.

18 MS. GRANT: YES.

19 AND I JUST -- 'CAUSE I WANT THE RECORD TO BE CLEAR IN

20 TERMS OF THE WAY THAT I PRACTICE AND OUR FIRM PRACTICES, WE HAVE

21 BEEN TRYING TO WORK WITH THEM. ALL I SAID ABOUT THE RULE 26F IS

22 I WANTED TO SEE WHAT THE COURT'S POSITION WAS, AND I THOUGHT

23 WE'D BE IN A BETTER POSITION AFTER THIS HEARING. THAT WAS WHAT

24 I PUT IN MY LETTER.

25 I ALSO PROPOSED THAT WE SIT DOWN AND TALK ABOUT A

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1 MUTUAL DOCUMENT PRESERVATION. IT GOES BOTH WAYS. AND WE SIT
2 DOWN -- AND I NEVER GOT A RESPONSE BACK TO THAT LETTER. SO WHAT
3 I THINK IS EXACTLY WHAT WE'RE WILLING TO DO, WHICH IS TO SIT
4 DOWN WITH THEM AND WORK OUT A SENSIBLE PLAN, OBVIOUSLY WITH THE
5 PRIORITY BEING, YOU KNOW, WHAT WE'VE ALL TALKED ABOUT, IS TRYING
6 TO GET TO THE BOTTOM OF DISCOVERING HOW THIS EMANATED FROM --
7 FROM THE COMPANY, IF IT DID.

8 WE WANT TO KNOW THAT, TOO. AND WE WILL WORK WITH
9 THEM TO TRY AND PRODUCE, WHETHER IT'S A 30(B)(6) DEPO OR
10 DOCUMENTS, TO COME UP WITH THAT DISCOVERY FIRST, BECAUSE I THINK
11 THAT'S THE MOST PRESSING.

12 THE COURT: OKAY.

13 MR. PULGRAM: WELL --

14 THE COURT: THE OTHER THING YOU MIGHT CONSIDER DOING
15 WITH EACH OTHER IS TALKING ABOUT SETTling THE CASE IN GENERAL.
16 I MEAN, THIS HAPPENED. IT'S OVER. YOU KNOW, I DON'T KNOW THAT
17 YOU NECESSARILY NEED TO SPEND TWO YEARS AND HUNDREDS OF
18 THOUSANDS OF DOLLARS LITIGATING ABOUT THIS PIECE OF PAPER.
19 MAYBE YOU COULD SETTLE IT EARLY AND FIGURE OUT SOME WAY OF
20 RESOLVING IT.

21 MS. GRANT: THAT'S A GOOD IDEA.

22 MR. PULGRAM: WE APPRECIATE THAT INFORMATION. I JUST
23 WANT TO BE CLEAR ON ONE THING.

24 THE COURT: I ACTUALLY REALLY HAVE TO GO, SO YOU CAN
25 ORDER A TRANSCRIPT.

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1 MR. PULGRAM: THANK YOU, YOUR HONOR.

2 MS. GRANT: THANK YOU, YOUR HONOR.

3 THE COURT: OKAY.

4 (PROCEEDINGS WERE CONCLUDED AT 3:09 P.M.)

5 --OOO--

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CERTIFICATE OF REPORTER

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C08-1376CW, SUCCESSFACTORS, INC., V. SOFTSCAPE, INC., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR

FRIDAY, APRIL 4, 2008

EXHIBIT 14

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 DEPARTMENT TWO, OAKLAND, CALIFORNIA CLAUDIA WILKEN, JUDGE

4 -000-

5 SUCCESSFACTORS, INC,) C-08-1376
6 PLAINTIFF,) CASE MANAGEMENT CLIMATE,
7 V.) CONFERENCE
8 SOFTSCAPE,) TUESDAY 6/17/08
9 DEFENDANT.)
10 _____)

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

12 APPEARANCES:

13 FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

20 MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO, PC
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24
25 REPORTED BY: STARR A. WILSON, CSR 2462

1 OAKLAND, CALIFORNIA; TUESDAY, JUNE 17, 2008; DEPARTMENT 2;
2 CLAUDIA WILKEN, JUDGE; 2:45 P.M.

3 -000-

4 **THE CLERK:** CALLING THE MATTER OF SUCCESSFACTORS
5 VERSUS SOFTSCAPE, CIVIL ACTION NUMBER C-08-1376.

6 COUNSEL, PLEASE COME FORWARD AND STATE YOUR
7 APPEARANCES FOR THE RECORD.

8 **MR. PULGRAM:** GOOD AFTERNOON, YOUR HONOR.
9 LAURENCE PULGRAM WITH PATRICK PREMO WITH FENWICK & WEST FOR
10 SUCCESSFACTORS.

11 **MR. TAYLOR:** GOOD AFTERNOON, YOUR HONOR. ROBERT
12 TAYLOR AND MY PARTNER, BRYAN SINCLAIR, APPEARING FOR THE
13 DEFENDANT, SOFTSCAPE.

14 **THE COURT:** SO THEY FIRED THEIR FIRST ATTORNEYS
15 AND HIRED NEW ATTORNEYS?

16 **MR. TAYLOR:** THAT'S CORRECT, YOUR HONOR.

17 **THE COURT:** OR VISA VERSA.

18 UM, I DON'T USUALLY GET CASE MANAGEMENT STATEMENTS
19 UNDER SEAL. I GUESS, UM, IF YOU REALLY HAVE TO, YOU CAN
20 SUBMIT -- WHO IS IT THAT SAYS THERE'S SOMETHING SECRET IN
21 HERE?

22 **MR. SINCLAIR:** OH, THERE WAS --

23 **THE COURT REPORTER:** I'M SORRY. YOUR NAME?

24 **MR. SINCLAIR:** I'M SORRY. THIS IS BRYAN SINCLAIR
25 FROM SOFTSCAPE.

1 THERE WAS SOME TEST -- ESSENTIALLY
2 CHARACTERIZATION OF TESTIMONY FROM A DEPOSITION THAT WAS
3 DESIGNATED AS UNDER THE PROTECTIVE ORDER. SO THEY PROPOSED
4 TO PUT LANGUAGE IN. WE SAID WE DON'T REALLY THINK YOU NEED
5 IT. BUT IF YOU DO, WE WOULD LIKE THAT TO BE EQUALLY TRUE
6 AND SO IT'S CONSISTENT WITH THE PROTECTIVE ORDER AND THE
7 DEPOSITION TESTIMONY ITSELF.

8 **MR. PULGRAM:** YOUR HONOR --

9 **MR. SINCLAIR:** THAT WAS THE MOTIVATION FOR IT AT
10 LEAST.

11 **THE COURT:** OH. SO YOU NEED TO FILE SOMETHING
12 THAT JUSTIFIES PUTTING IT UNDER SEAL IN ORDER FOR ME --

13 **MR. SINCLAIR:** I UNDERSTAND.

14 **THE COURT:** -- TO LOOK AT IT.

15 **MR. SINCLAIR:** I'VE DISCUSSED THAT YOU.

16 **THE COURT:** OKAY. OR ARE YOU COULD NOT AND JUST
17 LET IT BE FILED.

18 **MR. SINCLAIR:** OKAY. WE'LL DO ONE THING OR THE
19 OTHER -- TOMORROW.

20 **THE COURT:** OKAY.

21 **MR. PULGRAM:** IT'S -- I DON'T WANT TO GET INTO THE
22 MINUTIA BUT IT'S BEEN A PERSISTENT PROBLEM. AND PAGE THREE
23 IN ITS ENTIRETY IS WHAT THEY'VE ESSENTIALLY DESIGNATED TO BE
24 UNDER SEAL. IT'S JUST FACTS OF WHAT HAPPENED. THERE'S
25 NOTHING TRADE SECRET ABOUT IT.

1 AND WHILE WE'RE WORKING THROUGH THAT WITH THE
2 MAGISTRATE JUDGE, UM, THE FACT IS THAT AT THIS POINT WE
3 CAN'T EVEN SHOW THIS TO OUR CLIENT. AND THAT'S BECAUSE
4 EVERYTHING HAS BEEN DESIGNATED OUTSIDE COUNSEL ATTORNEYS
5 EYES ONLY. NOT EVEN INSIDE COUNSEL. NOT EVEN CONFIDENTIAL
6 FOR THE LAWSUIT. BUT OUTSIDE AEO. SO WE'RE REALLY STOPPED
7 IN TERMS OF TRYING TO MOVE THIS LITIGATION FORWARD BY THAT
8 APPROACH.

9 **THE COURT:** WELL, THE -- IN TERMS OF FILING THINGS
10 UNDER SEAL, WE LOOK WITH A PRETTY CAREFUL EYE ON THAT. AND
11 THERE HAS TO BE SOME EXTREMELY STRONG SECRECY REQUIRED TO
12 OVERRIDE THE PRESUMPTION THAT THIS IS A PUBLIC COURT AND
13 THAT EVERYTHING THAT GOES ON IN IT IS OPEN TO THE PUBLIC AND
14 THE PRESS.

15 SO I'M NOT SEEING ANYTHING AS I GLANCE AT THIS, IF
16 YOU CAN ENLIGHTEN ME, BUT, YOU KNOW, DON'T JUST DO IT AS AN
17 ABUNDANCE OF CAUTION BECAUSE IT'S NOT GOING TO BE LOOKED AT
18 IN THAT WAY.

19 IN TERMS OF THE DESIGNATIONS THAT PROBABLY THE
20 PROTECTIVE ORDER HAS SOME SORT OF MECHANISM WHERE YOU HAVE
21 TO GO TO COURT AND CONTEST THEIR DESIGNATIONS AND SO ON.

22 **MR. PULGRAM:** AND WE'RE GOING TO DO THE SIX TO
23 EIGHT WEEKS THAT IT TAKES TO DO AS LONG AS THEY KEEP DOING
24 IT THAT WAY. BUT IF -- WE'LL COME TO THAT AS WE GET TO THE
25 SCHEDULE HERE.

1 **THE COURT:** OKAY.

2 **MR. PULGRAM:** CERTAINLY WE'RE NOT ASKING YOU TO
3 DECIDE THAT ISSUE TODAY.

4 **THE COURT:** OKAY.

5 UM, SO WHAT ELSE DO WE HAVE HERE? YOU CAN TAKE A
6 SCHEDULING ORDER AND WE'LL FILL IN THE DATES. AND ATTACHED
7 TO IT YOU'LL FIND THE ORDER FOR PRETRIAL PREPARATION THAT
8 WILL TELL YOU THE PAPERWORK THAT NEEDS TO BE FILED IN
9 ADVANCE OF PRE-TRIAL CONFERENCE.

10 YOU'LL GET ANOTHER COPY THROUGH E-FILING.

11 SO IT SAYS HERE YOU'RE HAVING DISCOVERY DISPUTES.
12 DEFENDANT IS DISSATISFIED WITH THE CLIENTS. YOU GOT A
13 DISCOVERY CONFERENCE SCHEDULED FOR YESTERDAY. HOW DID THAT
14 GO?

15 **MR. PULGRAM:** IT'S ACTUALLY BEEN MOVED TO JULY 3,
16 YOUR HONOR.

17 **THE COURT:** OH. OKAY. SO YOU'RE GOING TO TRY TO
18 WORK THIS ALL OUT WITH JUDGE ZIMMERMAN?

19 **MR. PULGRAM:** WE ARE. AND, UM, I THINK -- THE
20 POINT FOR US IN TERMS OF THE SCHEDULE HERE, AS YOU KNOW, WE
21 PROPOSED COLLECTIVELY, UM, A PROPOSED SCHEDULE THAT IS IN
22 THE CMC STATEMENT. UM, WE'VE TRIED TO COME UP WITH ONE, I
23 THINK, THAT'S REALISTIC. BUT AT THE SAME TIME IF DISCOVERY
24 DOESN'T GET MADE, IT IS A VERY AGGRESSIVE SCHEDULE. UM,
25 NOVEMBER 26 IS THE, UM, STIPULATED DATE FOR FACT DISCOVERY

1 TO CLOSE. AND THERE ARE TWO REASONS WHY I THINK THAT MAY
2 END UP BEING AGGRESSIVE. UM, NOT THAT WE WANT TO MOVE IT,
3 BUT I WANT TO CAUTION, UM, THE COURT ABOUT THIS. ONE IS
4 THAT WE'RE NOT GETTING DOCUMENTS PRODUCED YET. AND, AGAIN,
5 NOT TO GO INTO THE MINUTIA HERE, BUT WE'RE THREE MONTHS
6 SINCE THE SERVICE OF OUR DOCUMENT REQUESTS. WE FILED THEM
7 WITH THE COMPLAINT. AS YOU REMEMBER, YOU AUTHORIZED
8 DISCOVERY TO OPEN ON MARCH 27 WHEN YOU ISSUED THE PI. UM,
9 WE'RE NOW AT JUNE 16.

10 AND WE WERE TOLD ON FRIDAY THAT THEY HAVE YET TO
11 EVEN RUN THE TERM SEARCHES FOR OVER 90 PERCENT OF THE
12 CUSTODIANS OF THE DOCUMENT. AND EVEN AS TO THE TEN PERCENT
13 OF THE CUSTODIANS, WE HAVEN'T GOTTEN A FULL PRODUCTION.

14 AND THE SIGNIFICANCE OF THIS, WHAT THAT MEANS IS
15 THAT WE -- WE, SO FAR, DON'T HAVE ANY DOCUMENTS THREE MONTHS
16 INTO THIS. WE'VE BURNT THREE MONTHS SO FAR. SO IF -- IF
17 THIS RADICALLY CHANGES, WE CAN GET DISCOVERY DONE BY
18 NOVEMBER 26.

19 BUT IF THIS IS GOING TO BE ONE THAT'S PULLING
20 TEETH OR HAMMERING TONGUE TO GET EVERY SINGLE PIECE OF
21 INFORMATION TO FIGHT EVERY CONFIDENTIALITY DESIGNATION AND
22 SO FORTH, THEN THAT DATE IS GOING TO BE AGGRESSIVE.

23 THERE IS ONE OTHER POINT THAT AFFECTS THAT DATE
24 AND THEREFORE AFFECTS THE WHOLE CALENDAR HERE. UM, AS THE
25 CMC STATEMENT ALSO SAYS, THERE'S BEEN A SECOND FRONT OPENED

1 BY SOFTSCAPE IN MASSACHUSETTS IN A LAWSUIT THERE. AND THE
2 LAWSUIT THERE ESSENTIALLY ASSERTS THE SAME CLAIMS AS THEIR
3 UNCLEAR HANDS CLAIMS HERE.

4 UM, THEIR UNCLEAR HANDS ARE DESCRIBED AT PAGE FIVE
5 OF THE CMC AS SUCCESSFACTOR'S EMPLOYEES POSES CUSTOMERS AND
6 GAIN ACCESS UNDER FALSE PRETENSES TO SOFTSCAPE'S SERVERS.

7 UM, AND FURTHER IN HIS DEPOSITION, MR. WATKINS,
8 WHO IS THE GUY WHO ACCESSED OUR PASSWORD PROTECTED ACCOUNTS
9 AND WROTE THE PRESENTATION. HE SAID THE REASON HE DID THAT
10 WAS BECAUSE HE WANTED TO CHECK AND SEE IF WE WERE TAKING HIS
11 TRADE SECRETS. AND THEY, THE COMPLAINT IN MASSACHUSETTS
12 CLAIMS WE'VE TAKEN THEIR TRADE SECRETS.

13 SO WE HAVE THIS LAWSUIT BACK THERE. WE'RE GOING
14 TO TRY MOVE IT HERE. THEY'RE GOING TO TRY TO NOT MOVE IT
15 HERE. UM, BUT IF IT COMES HERE, THAT COULD AFFECT WHAT THE
16 PLEADINGS ARE, HOW FAST WE CAN GET DONE WITH DISCOVERY. AND
17 SO I SAY THAT, ALSO BY WAY OF THINKING AHEAD, TO WHETHER OR
18 NOT THE NOVEMBER 26 DATE, UM, IS ONE WE'LL BE ABLE TO
19 SUCCESSFULLY ACCOMPLISH.

20 **THE COURT:** OKAY.

21 **MR. PULGRAM:** I THINK HOLDING OUR FEET TO IT
22 INITIALLY IS A GOOD THING.

23 **THE COURT:** OKAY.

24 UM, WELL, I ALWAYS HATE TO HAVE LITIGATION
25 PROCEEDING ON TWO FRONTS SO I DON'T KNOW. I MEAN I COULD

1 SEND THIS CASE TO MASSACHUSETTS IF THAT WOULD HELP. OR IT'S
2 IN STATE COURT IN MASSACHUSETTS, I DON'T KNOW HOW YOU GET IT
3 TO FEDERAL COURT HERE. IF YOU DO IT SOMEHOW THEN, YES, I
4 WILL RELATE IT AND I WILL CONSOLIDATE IT.

5 **MR. TAYLOR:** IT IS IN STATE COURT, YOUR HONOR.

6 **MR. PULGRAM:** IT WOULD BE A FORM NONCONVENIENCE
7 TYPE OF ARGUMENT THAT THE EXACT SAME CLAIM IS ALREADY OUT
8 HERE.

9 **THE COURT:** YEAH. THERE IS SOME, I GUESS YOU CAN
10 MOVE TO STAY IT ON THE --

11 **MR. PULGRAM:** THAT'S ANOTHER APPROACH. BUT -- BUT
12 FROM OUR PERSPECTIVE, THOSE REALLY ARE COMPULSORY CROSS
13 COMPLAINTS FOR THIS ACTION. IF YOU HAVE AN UNCLEAN HANDS
14 DEFENSE HERE. THE CLAIM THAT THE SAME CONDUCT IS ACTIONABLE
15 SHOULD BE HERE. AND THAT -- THAT IS A BASIS FOR THIS COURT
16 TO HAVE JURISDICTION OVER.

17 **THE COURT:** WELL, IF YOU HAVE SOME MOTION TO MAKE
18 ON THAT, I'LL --

19 **MR. PULGRAM:** I DON'T HAVE ONE FOR YOU AT THIS
20 TIME.

21 **THE COURT:** NO, I'M SURE YOU DON'T. IF YOU DO
22 HAVE ONE IN THE FUTURE, I WILL HAVE TO RULE ON IT.

23 BUT IN GENERAL, I THINK IT MAKES SENSE FOR
24 EVERYONE TO HAVE THE LAWSUIT TOGETHER SOMEWHERE, WHETHER
25 IT'S IN STATE OR FEDERAL COURT, WHETHER IT'S HERE OR THERE.

1 UM, SO, AND THEN AS FAR AS THE DISCOVERY, THAT
2 THAT IS SORT OF DISCONCERTING BECAUSE, AT LEAST WITH PRIOR
3 COUNSEL WE HAD ASSURANCES THAT DISCOVERY WOULD BE
4 FORTHCOMING, THAT DOCUMENTS WOULD BE PRESERVED, AND POSSIBLY
5 EVEN ESSENCE TYPES OF INFORMATION ON COMPUTERS WOULD BE
6 PRESERVED SO I'M --

7 **MR. TAYLOR:** YES.

8 **THE COURT:** -- CONCERNED TO SEE THAT THAT
9 ATTORNEY WITH WHOM I HAD THAT UNDERSTANDING IS NO LONGER
10 HERE AND DISCOVERY IS NOT FORTHCOMING.

11 **MR. SINCLAIR:** WELL, I DON'T -- I WOULD DISAGREE
12 WITH THE CHARACTERIZATION THAT WE'VE PRODUCED NOTHING AND
13 THAT WE'VE DONE NOTHING.

14 WE'VE BEEN COUNSEL OF RECORD IN THE CASE NOW FOR
15 25 COURT DAYS AND MADE MULTIPLE PRODUCTIONS, THE MOST RECENT
16 ONE OF YESTERDAY IN THAT TIME PERIOD.

17 THEY MAY BE DISSATISFIED WITH THE SCOPE OF OUR
18 SPEED WITH WHICH WE CAN SEARCH 1.5 TERABYTES OF DATA AND
19 REVIEW THE INFORMATION AND PRODUCE THE INFORMATION. BUT ALL
20 OF THE -- ALL OF THE DATA HAS BEEN PRESERVED AND -- AND
21 PROPERLY DONE SO. IT'S NOW BEEN CONSOLIDATED FROM FOUR
22 LOCATIONS FROM ALL OVER THE WORLD INTO ONE LOCATION FOR EASE
23 OF COUNSEL TO ACTUALLY ACCESS IT WITH CONSULTANTS, PERFORM
24 THE SEARCHES.

25 THE SEARCH TERMS THAT WE'RE AGREEABLE TO THE

1 PLAINTIFF HAVE NOW BEEN AGREED TO AS OF YESTERDAY. SO WE
2 ARE GOING TO RUN THOSE SEARCH TERMS ON AN ORDER OF HALF A
3 DOZEN CUSTODIANS THAT WE LET THEM SELECT TO DO IT IN THE
4 ORDER THAT THEY THOUGHT WAS MOST IMPORTANT. AND THAT SEARCH
5 IS ONGOING AS WE STAND HERE. AND WE WILL CONTINUE TO
6 PRODUCE DOCUMENTS EVERY TEN COURT DAYS. AND WE'VE TOLD THEM
7 THAT REPEATEDLY AND THAT'S WHAT WE'RE DOING.

8 **THE COURT:** DID YOU SAY YOU HAVEN'T GOT ANY
9 DOCUMENTS YET?

10 **MR. PULGRAM:** I DID NOT SAY THAT. I SAID THEY
11 HAVE YET TO RUN THE SEARCH TERMS ON 90 PERCENT OF THE PEOPLE
12 WHO HAVE DOCUMENTS. AND WHAT THAT MEANS IS, WE SENT THEM A
13 LIST ON MAY 1 OF SEARCH TERMS. BECAUSE, YOUR HONOR, YOU
14 REQUIRED A STIPULATION, A CERTIFICATION THAT THE RECORDS ARE
15 BEING PRESERVED. AND YOU GOT ONE FROM THEM ON APRIL 30. IT
16 SAID WE HAVE ALL THE RECORDS PRESERVED. ON MAY 1 WE SAID
17 WOULD YOU PLEASE SEARCH THESE TERMS? SUCCESSFACTORS BEING
18 ONE. PRESENTATION. NAKED TRUTH BEING -- YOU KNOW, THE
19 WHOLE LIST OF RELEVANT TERMS. WE HEARD BACK FROM THEM OVER
20 A MONTH LATER SAYING WE DON'T LIKE YOUR TERMS AND PROPOSING
21 SOME OTHERS.

22 ON -- ON JUNE 6 WE FLIPPED BACK TO THEM. WE SAID,
23 FINE, YOU SAY WE CAN ADD TEN TERMS TO YOUR TERMS. WE GAVE
24 THEM TEN TERMS ON JUNE 6. AND LAST FRIDAY, THEY FINALLY
25 SAID OKAY, OKAY, WE'LL SEARCH, WITH THE HEARING WITH THE

1 MAGISTRATE COMING UP AND YOUR HONOR COMING UP, WE'LL SEARCH
2 THE TERMS THAT YOU WANT.

3 IT REQUIRES PUSHING A BUTTON TO SEARCH THE
4 TERABYTE, IF THAT'S WHAT THEY SAY IT IS, OF DOCUMENTS TO
5 PULL OUT WHAT'S RELEVANT. AND SINCE MARCH IT HASN'T
6 HAPPENED.

7 SO WE'VE GOTTEN A SCATTERING OF THINGS. AND TODAY
8 WE DID RECEIVE DOCUMENTS THAT WERE REFERRED TO IN
9 INTERROGATORIES THAT WERE SERVED ON US ON MAY 20, A MONTH
10 AGO.

11 THESE ARE DOCUMENTS REFERRED TO IN THE
12 INTERROGATORIES THAT HAVE BEEN HELD UP FOR A MONTH.

13 SO WE SEE WHAT WE'RE UP AGAINST HERE. THEY'VE
14 REFERRED TO THOSE DOCUMENTS. THEY OBVIOUSLY HAVE THEM.
15 THEY OBVIOUSLY KNOW THEY'RE THERE. THEY GAVE THEM TO US
16 YESTERDAY. ACTUALLY FEDEXED, SO WE GOT THEM TODAY.

17 UM, SO THIS IS THE GAME THAT'S GOING TO
18 UNFORTUNATELY APPEAR TO BE PLAYED OUT. AND THAT'S MY
19 CONCERN OVER THE TIME HERE.

20 UM, ONE SUGGESTION I WOULD -- I'M SORRY. I DIDN'T
21 MEAN --

22 **THE COURT:** WHY WAS THE DISCOVERY CONFERENCE
23 CONTINUED TO JULY 3?

24 **MR. PULGRAM:** AT -- AT THAT POINT, UM, THE
25 MAGISTRATE JUDGE, UM, WHO -- YOU MAY KNOW HIS PROCEDURE.

1 MAGISTRATE JUDGE ZIMMERMAN HAS YOU WRITE LETTERS BACK AND
2 FORTH. AND HE RULED ON A PART OF THE LETTER. HE ORDERED
3 THEM -- HE ORDERED US MUTUALLY TO AGREE TO SEARCH TERMS BY A
4 DATE CERTAIN. IT TURNED OUT THEY HAD ACTUALLY AGREED TO
5 THEM THE DAY BEFORE THE HEARING WITH THE JUDGE WAS SUPPOSED
6 TO HAPPEN.

7 UM, AND HE SAID COME BACK ON JULY 3 FOR A FULL
8 CONFERENCE, NOT JUST ON LIMITED SUBJECTS, BUT A FULL
9 DISCOVERY CONFERENCE -- UM, ON JULY 3. AND HE ALSO ORDERED
10 THAT THE PARTIES ARE TO UNDERSTAND THAT IF THEY OBJECT TO
11 PART OF A REQUEST, THEY STILL HAVE TO PRODUCE ALL THE REST
12 OF IT. UM, SO I THINK WHAT HE ENVISIONED WAS A BIGGER
13 LATER, UM, DETERMINATION ON DISCOVERY.

14 **THE COURT:** OKAY. WELL, --

15 **MR. SINCLAIR:** I'M CONFIDENT THAT BY THE TIME WE
16 SEE MAGISTRATE ZIMMERMAN ON JULY 3, WE WILL HAVE NOT ONLY
17 PRODUCED SUBSTANTIAL AMOUNT OF INFORMATION, BUT RESOLVED
18 MANY OF THE ISSUES THAT ARE RAISED IN COMPETING LETTER
19 BRIEFS THAT ARE BEFORE HIM RIGHT NOW.

20 **THE COURT:** OKAY. WELL, I HOPE THAT'S THE CASE.

21 **MR. SINCLAIR:** SO DO I.

22 **THE COURT:** I HAVE TO -- I'LL CALL HIM AND TELL
23 HIM NOT TO DELAY THINGS BUT TO KEEP THIS MOVING.

24 UM, SO I GUESS I CAN SET THE DATES THAT YOU'VE
25 PROPOSED IN THE CHART AT THE END.

1 **MR. SINCLAIR:** THE ONLY ONE THAT THERE WAS ANY
2 DISPUTE ABOUT IS THE LAST DATE TO AMEND PLEADINGS. AND WE
3 WEREN'T ABLE TO AGREE ON A FIXED DATE IN AUGUST, ALTHOUGH WE
4 HAVE THE BEGINNING AND END OF AUGUST PROPOSED.

5 **THE COURT:** YEAH. WELL, I DON'T THINK THAT MAKES
6 A HUGE DIFFERENCE. SO LET'S JUST CALL IT AUGUST 29 FOR
7 ADDING ANY ADDITIONAL PARTIES OR CLAIMS.

8 UM, AND WHAT WERE YOU GOING TO DO ABOUT
9 SETTLEMENT?

10 **MR. PULGRAM:** WE'VE STIPULATED TO STIPULATE TO A
11 JAMS MEDIATOR.

12 **THE COURT:** OKAY.

13 **MR. PULGRAM:** UM, TO HAPPEN AT WHAT IS ANTICIPATED
14 TO BE THE CLOSE OF FACT DISCOVERY.

15 **THE COURT:** OH, WELL, THAT'S NO GOOD. YOU NEED TO
16 DO THAT SOONER.

17 **MR. SINCLAIR:** I AGREE, YOUR HONOR.

18 **MR. PULGRAM:** THE PROBLEM IS WE HAVE NO
19 INFORMATION. NO IS AN OVERSTATEMENT. BUT IF WE DON'T HAVE
20 THE STUFF WE'VE ASKED FOR SO WE'RE HAMSTRINGED.

21 **THE COURT:** OKAY. WE DON'T WANT TO WAIT UNTIL THE
22 END OF DISCOVERY. WE CAN WAIT FOR THREE OR FOUR MONTHS IF
23 WE HAVE TO. BUT THERE'S NO POINT TO WAITING TO THE END OF
24 DISCOVERY TO TRY TO SETTLE THE CASE.

25 **MR. PULGRAM:** BUT --

1 **THE COURT:** WE'LL REFER IT TO PRIVATE MEDIATION
2 FOR A SETTLEMENT CONFERENCE TO BE HELD, HOW ABOUT IN 120
3 DAYS?

4 **MR. TAYLOR:** FAIR ENOUGH.

5 **THE COURT:** OKAY. SO --

6 **MR. PULGRAM:** MAY I MAKE ONE SUGGESTION IN THAT
7 REGARD? AND THAT WOULD BE, UM, I THINK IT COULD BE USEFUL
8 RIGHT AFTER THAT TIME, WHICH WOULD BE MID OCTOBER, TO HAVE A
9 CMC TO SEE WHERE WE ARE, TO SEE IF WE'RE ABLE TO ADHERE TO
10 THE DISCOVERY CUFOFF THAT WE HAVE, UM, AND TO TAKE STOCK OF
11 WHAT'S HAPPENED IN MASSACHUSETTS.

12 **THE COURT:** WELL, I DON'T WANT TO SET A CONFERENCE
13 FOR NO REASON. IF YOU NEED SOMETHING, YOU MAKE A MOTION FOR
14 IT.

15 **MR. PULGRAM:** VERY WELL.

16 **THE COURT:** IF IT HASN'T SETTLED AND YOU WANT TO
17 HAVE ANOTHER SETTLEMENT CONFERENCE, AND THEY WON'T AGREE,
18 THEN FILE A MOTION. IF THERE'S DISCOVERY PROBLEMS, FILE A
19 MOTION. IF THERE'S -- IF YOU'RE NOT SUCCESSFUL IN GETTING
20 THESE TWO CASES PUT TOGETHER, THERE WON'T BE ANYTHING I CAN
21 DO ABOUT THAT AT THE STATUS CONFERENCE. IF THERE'S
22 SOMETHING I CAN DO, FILE A MOTION FOR ME TO DO IT. AND IF
23 IT'S NOT SOMETHING I CAN DO, THEN THERE WON'T BE ANYTHING I
24 CAN DO ABOUT IT.

25 **MR. PULGRAM:** UNDERSTOOD.

1 **THE COURT:** I WOULD USUALLY HAVE ANOTHER CMC ON
2 THE CASE DISPOSITIVE MOTION DATE. UM, YOU KNOW, AND I'LL
3 SET THAT IN A MINUTE. BUT IF YOU NEED SOMETHING IN THE
4 MEANTIME, JUST FILE A MOTION FOR WHAT -- WHAT IT IS THAT YOU
5 NEED.

6 THE FACT DISCOVERY CLOSES ON NOVEMBER 26 OF '08.
7 OH, THAT PRIVATE MEDIATION WOULD BE DONE BY, UM, OCTOBER 17
8 OF '08.

9 UM, IDENTIFY EXPERT WITNESSES NOVEMBER 26 OF '08.
10 EXCHANGE OPENING EXPERT REPORTS DECEMBER 17, '08.
11 REBUTTAL EXPERT REPORTS JANUARY 9, '09.
12 EXPERT DISCOVERY CLOSES JANUARY 23, '09.

13 UM, CASE DISPOSITIVE MOTION CUTOFF MARCH 16, '09.

14 **THE CLERK:** THAT'S A MONDAY.

15 **THE COURT:** IS THAT A THURSDAY?

16 **THE CLERK:** NO, THAT IS A MONDAY.

17 **THE COURT:** OKAY. SO THAT WILL BE MARCH 19. AND
18 I IMAGINE MAYBE THE CASE OF BOTH OF YOU WOULD BE MAKING CASE
19 DISPOSITIVE MOTIONS.

20 **MR. PULGRAM:** AT LEAST IN PART.

21 **MR. TAYLOR:** SO IF THE DEFENDANT PLANS ON THAT,
22 YOUR HONOR.

23 **THE COURT:** AND DO YOU, WILL YOU BE MAKING SOME?

24 **MR. PULGRAM:** WE EXPECT TO. CERTAIN ISSUES AT
25 LEAST.

1 **THE COURT:** OKAY. WELL, LET'S HAVE THE DEFENDANT
2 NOTICE THE INITIAL MOTION THEN. AND YOU SAID FEBRUARY
3 NINTH. I WANT TO DO IT SIX WEEKS BEFORE THE HEARING DATE.

4 **MR. PULGRAM:** THAT SHOULD BE MARCH -- FEBRUARY 7.

5 **THE CLERK:** FEBRUARY 5.

6 **MR. PULGRAM:** FEBRUARY 5.

7 **THE COURT:** WHAT IS IT?

8 **MR. PULGRAM:** FEBRUARY 5.

9 **THE COURT:** FEBRUARY 5, OKAY.

10 **THE CLERK:** FEBRUARY 5.

11 **THE COURT:** SO IF YOU WOULD FILE YOUR MOTION SIX
12 WEEKS AHEAD, NOT FIVE WEEKS AHEAD.

13 AND THEN YOU WAIT AND FILE YOURS AS AN OPPOSITION
14 AND CROSS MOTION TO THEIRS ON THE NINETEENTH.

15 AND THEN YOU WOULD FILE YOUR REPLY TO THE CROSS
16 MOTION, REPLY TO YOUR MOTION AND OPPOSITION TO THE CROSS
17 MOTION ON FEBRUARY 26.

18 REPLY TO THE CROSS MOTION MARCH 5.

19 AND WE'D HEAR IT ON MARCH 19.

20 **MR. PULGRAM:** VERY WELL.

21 **THE COURT:** AND A TRIAL ON MAY 11 -- I DON'T SEE
22 TEN TO FIFTEEN DAYS. I MEAN THIS THING HAPPENED AND THERE
23 PROBABLY MIGHT BE SOME DAMAGES. BUT IT'S MAYBE UNCLEAR NOW
24 WHAT HAPPENED. BUT BY THAT TIME IT WILL BE CLEAR WHAT
25 HAPPENED AND THERE WON'T BE A LOT OF DISPUTE ABOUT THAT, I

1 DON'T THINK. SO I DON'T KNOW WHAT YOU'D BE DOING FOR TWO OR
2 THREE WEEKS IN TRIAL.

3 **MR. PULGRAM:** UM, IT IS A FAIR QUESTION, YOUR
4 HONOR. SO FAR THEY'VE DENIED THAT THEY CREATED THE VERY
5 LAST VERSION OF THE PRESENTATION. UM, AND DENIED THAT THEY
6 HAVE ANY CONNECTION TO THOSE WHO SENT IT OUT. I THINK
7 THERE'S GOING TO BE A GOOD BIT OF TESTIMONY, AT LEAST AS WE
8 KNOW THE FACTS SO FAR THAT IS GOING TO BE CIRCUMSTANTIAL,
9 UM, SO IT WON'T BE QUITE AS CLEAR AS SOMEONE ON THEIR SIDE
10 NECESSARILY ADMITTING, OH, YEAH, I WROTE THAT DOCUMENT. SO
11 FAR MR. WATKINS SAYS I DON'T KNOW HOW THAT LAST CHANGE GOT
12 TO PAGE 12 OR 16 OR 31. UM, SO --

13 **THE COURT:** YOU'RE GOING TO HAVE TO FIGURE IT OUT
14 BEFORE THEN SO HAVING DETECTIVE WORK IN FRONT OF A JURY.

15 **MR. PULGRAM:** UNDERSTOOD.

16 **THE COURT:** AND EVEN TWO WEEKS, WHAT IT'S ALL
17 ABOUT THIS PRESENTATION AND WHO WROTE IT AND CONSENTED AND
18 WHAT DAMAGES AROSE FROM IT.

19 **MR. PULGRAM:** IT IS ALSO ABOUT THE REPEATED ACCESS
20 THAT THEY MADE TO OUR PASSWORD PROTECTED SITES IN VIOLATION
21 OF THE COMPUTER FRAUD AND ABUSE ACT.

22 AND NOW THEIR UNCLEAN HANDS DEFENSE, REMEMBER,
23 PURPORTS TO RAISE CONDUCT BY OUR PEOPLE TRYING TO LEARN
24 ABOUT THEIR BUSINESS. THEY SAY WE ATTEMPTED TO LOG INTO
25 THEIR SECURED AREAS. THEY DON'T SAY WE SUCCEEDED. BUT THIS

1 IS PART OF THE UNCLEAN HANDS DEFENSE. AND THEY CLAIM THAT
2 WE'VE STOLEN THEIR TRADE SECRETS.

3 **THE COURT:** OKAY. IF YOU'RE NOT ABLE TO GET THESE
4 CASES CONSOLIDATED OR STAYED, THEN I WOULD BE INCLINED TO
5 STAY THAT PART OF THIS CASE PENDING HAVING THAT DONE IN
6 MASSACHUSETTS BECAUSE WE'RE NOT GOING TO DO IT TWICE. SO IF
7 WE CAN'T SOMEHOW GET IT ALL IN ONE PLACE, THAT IS IF WORSE
8 COMES TO WORSE, I'LL STAY MY PART AND ON ANYTHING THAT IS
9 DUPLICATIVE OF WHAT IS GOING TO HAPPEN IN MASSACHUSETTS AND
10 WE'LL JUST DO THE PLAINTIFF'S CASE.

11 UM, MAY IS NOT SO GOOD HERE. I'VE GOT QUITE A FEW
12 CASES ALREADY SET FOR MAY. SO HOW ABOUT JUNE 1? THEN --

13 **MR. SINCLAIR:** THAT'S FINE, YOUR HONOR.

14 **THE COURT:** -- I'LL CALL IT AN EIGHT-DAY TRIAL.

15 **MR. TAYLOR:** WE THINK FIVE DAYS IS AS MUCH AS YOU
16 NEED TO ALLOCATE FOR IT BUT --

17 **THE COURT:** OKAY. WELL, I'LL CALL IT EIGHT AND
18 HOPE FOR FIVE. BUT I CAN'T SEE DOING MORE THAN EIGHT. AND
19 THEN WE'LL HAVE A PRETRIAL CONFERENCE, UM, MAY 19 AT TWO
20 O'CLOCK. AND FURTHER CASE MANAGEMENT CONFERENCE, UM, MARCH
21 --

22 **THE CLERK:** NINETEEN.

23 **THE COURT:** -- NINETEENTH AT TWO O'CLOCK EVEN IF
24 NO CASE DISPOSITIVE MOTIONS ARE FILED. YOU'LL BE GOING TO
25 JAMS IN FOUR MONTHS. IF IT DOESN'T SETTLE THEN, I WILL WANT

1 YOU PREFERABLY TO GO BACK TO THAT SAME ARBITRATOR MAYBE
2 AFTER THE SUMMARY JUDGMENT MOTION IS FILED OR AFTER ALL THE
3 DISCOVERY IS DONE OR WHEN THE EXPERT REPORTS COME OUT AND SO
4 ON. IF NECESSARY, IF YOU CAN'T AGREE TO GO BACK TO THE JAMS
5 PERSON, EVENTUALLY I'LL SEND YOU A MAGISTRATE JUDGE. BUT I
6 THINK YOU'LL BE BETTER OFF STICKING WITH WHOEVER YOU COME
7 WITH AT JAMS AND JUST GO BACK TO THEM PERIODICALLY AT
8 REASONABLE INTERVALS.

9 **MR. SINCLAIR:** IF I MAY BRIEFLY COMMENT ON THE
10 QUESTION OF SETTLEMENT, YOUR HONOR, WE ARE -- THE CLIENT
11 EXPRESSLY ASKED ME TO EXPLAIN THAT THERE'S A HIGH MOTIVATION
12 TO SETTLE THIS CASE. THE PROBLEM IS THERE HAS NOT BEEN A
13 SINGLE OFFER THAT HAS BEEN MADE SINCE WE'VE BEEN COUNSEL.
14 AND INSTEAD WE'VE BEEN TOLD YOU NEED TO MAKE AN OFFER, WHICH
15 WE CAN'T DO BECAUSE WE CAN'T ASSESS ANY DAMAGES.

16 **THE COURT:** WELL, I GENERALLY TELL PLAINTIFFS TO
17 MAKE A DEMAND FIRST. NOW, MAYBE THEY'LL SAY THEY NEED THE
18 DISCOVERY TO KNOW WHAT HAPPENED OR SO ON AND SO FORTH. BUT
19 MY STRATEGY IN SETTLEMENT IS TO SAY THE PLAINTIFF IS THE ONE
20 WHO WANTS SOMETHING SO THE PLAINTIFF OUGHT TO MAKE A DEMAND
21 FIRST. AND THEN THE DEFENDANT SHOULD MAKE AN OFFER IN
22 RESPONSE TO THAT. SO I WOULD SUGGEST THAT YOU DO WHAT YOU
23 NEED TO DO TO MAKE YOUR DEMAND.

24 NOW MAYBE YOUR DEMAND INCLUDES SOME SORT OF
25 CONFESSION OR TELL US WHAT YOU DID HERE AND GIVE US THIS

1 DISCOVERY. AND IN ADDITION TO SOME SORT OF MONETARY DEMAND
2 OR SOME SORT OF EVEN AFFIRMATIVE CONDUCT-TYPE DEMAND THAT
3 THEY WON'T DO THIS SORT OF THING AGAIN. BUT COME UP WITH
4 SOMETHING AND PUT IT ON THE TABLE AT LEAST TO GET THINGS
5 MOVING.

6 **MR. PULGRAM:** YOUR HONOR, WE HAVE TALKED ABOUT THE
7 NONMONETARY ASPECTS OF THIS. UM, AND WE HAVE TOLD THEM VERY
8 CLEARLY THAT WE NEED TO GET THE ACTUAL DOCUMENTS THAT SHOW
9 WHAT HAPPENED HERE. UM, UNLESS, UM, THEY HAVE SOME NUMBER
10 THEY'RE PREPARED TO OFFER THAT IS SUCH THAT WE COULDN'T
11 REFUSE IT, NOT EVEN KNOWING WHAT HAPPENED. BUT AT THIS
12 POINT, HAVING A STONEWALL ERECTED SO THAT WE CAN'T SEE
13 ANYTHING OF WHAT'S HAPPENED, WE'RE NOT IN A POSITION TO --
14 TO MAKE THAT MONETARY -- WE WOULD VERY MUCH LIKE TO, BUT YOU
15 MAKE -- IT'S VERY CLEAR WHAT'S GOING ON.

16 **THE COURT:** BUT WHAT YOU MIGHT DO THEN IS DO YOUR
17 OWN INVESTIGATION INTO WHAT REALLY WENT ON AND PRESENT TO
18 THEM A BELIEVABLE SCENARIO. I MEAN YOU CAN UNDERSTAND WHY
19 THEY WOULDN'T WANT TO SETTLE, NOT KNOWING WHAT HAPPENED,
20 IT'S HARD TO KNOW SOMETHING IS NOT GOING TO HAPPEN AGAIN IF
21 YOU'RE NOT KNOWING THE FIRST TIME. SO IF YOU CAN FIGURE OUT
22 HOW IT DID HAPPEN AND SHOW THEM THAT, THEN HOPEFULLY THEY'LL
23 BE IN A MORE CONDUCTIVE FRAME OF MIND TO BE ABLE TO TRUST
24 THAT IT'S NOT GOING TO HAPPEN AGAIN ONCE YOU KNOW IT HAS NOT
25 HAPPENED THE FIRST TIME.

1 **MR. SINCLAIR:** WE HAVE ANSWERED DETAILED
2 INTERROGATORIES AND PROVIDED A WITNESS WHO TESTIFIED AT
3 LENGTH ABOUT EVERYTHING THAT IS POSSIBLY WITHIN THE
4 COMPANY'S KNOWLEDGE ABOUT HOW THIS DOCUMENT LEFT THE BOUNDS
5 OF THE COMPANY AND WE JUST DON'T KNOW. THE OTHER THING WE
6 DON'T HAVE --

7 **THE COURT:** YOU MIGHT TRY HARDER TO FIND OUT.

8 **MR. SINCLAIR:** I'M IN THE PROCESS OF TRYING VERY
9 HARD. BUT AT SOME POINT YOU HIT A DEAD END. EVERYBODY
10 RAISES THEIR HANDS AND SAY I JUST DON'T KNOW. BUT THE
11 BIGGER PROBLEM WE'RE FACING IS THERE IS A VERY STRONG
12 IMPRESSION, BOTH BY COUNSEL AND THE CLIENT, THAT THIS CASE
13 IS ABOUT THE GENERATION OF ATTORNEYS' FEES AS THE NEED TO
14 CAUSE PAIN TO SOFTSCAPE AS A PUNISHMENT FOR WHAT IT DID WHEN
15 THERE ARE NO REAL DAMAGES. SO WE HAVE VERY DETAILED DAMAGES
16 DISCOVERY, THE ANSWERS TO WHICH ARE DUE IN A FEW WEEKS,
17 ABOUT WHAT IT IS THEY CLAIM TO HAVE SUFFERED BECAUSE WE
18 HAVEN'T SEEN ANY DOCUMENTS THAT SUPPORT IT AND WE HAVEN'T
19 HEARD ANYTHING THAT IS REAL THUS FAR IN THE CASE.

20 **THE COURT:** UH-HUH.

21 **MR. PULGRAM:** I, MY ONLY COMMENT TO THAT IS I
22 DIDN'T FILE A SECOND LAWSUIT. THE GENERATION OF ATTORNEYS'
23 FEES, I DIDN'T FILE A SECOND LAWSUIT.

24 **MR. SINCLAIR:** DO YOU HAVE ANY COMMENT ABOUT THE
25 DAMAGES ASPECT OF THAT IN THE FIRST LAWSUIT?

1 **THE COURT:** ARE YOU ASKING HIM?

2 **MR. SINCLAIR:** YEAH, I WAS JUST ASKING HIM.

3 **THE COURT:** YEAH. GENERALLY, WE CONDUCT THINGS
4 THROUGH THE COURT. BUT I UNDERSTAND YOU THINK THERE AREN'T
5 ANY DAMAGES. ON THE OTHER HAND, IT'S NOT SOMETHING THAT YOU
6 WOULD WANT TO HAPPEN TO YOU SO IT MIGHT NOT JUST BE A
7 QUESTION OF --

8 **MR. SINCLAIR:** I UNDERSTAND.

9 **THE COURT:** -- MONEY DAMAGES. IT MIGHT BE A
10 QUESTION OF WANTING TO MAKE SURE THAT WHY THIS HAPPENED, HOW
11 IT HAPPENED, AND YOU HAVE SOME ASSURANCE THAT IT'S NOT GOING
12 TO HAPPEN AGAIN. AND MY FEELING IS THAT IF THAT WERE MORE
13 CLEAR THAT IT MIGHT BE ALSO MORE CLEAR THAT THERE REALLY
14 WEREN'T ANY ACTUAL QUANTITIFIABLE FINANCIAL DAMAGES. BUT
15 THAT THEY'LL BE SATISFIED TO KNOW THAT, AS I SAY, THAT THEY
16 KNOW WHAT HAPPENED AND THEY FEEL COMFORTABLE THAT IT'S NOT
17 GOING TO HAPPEN AGAIN. SO IT MAY BE HARD FOR YOU TO FIND
18 OUT WHAT HAPPENED, BUT IT'S A LOT HARDER FOR THEM TO FIND
19 OUT WHAT HAPPENED. AT LEAST IT'S YOUR COMPANY. SO I WOULD
20 GO BEYOND JUST ASKING PEOPLE WHAT HAPPENED AND ACCEPTING "I
21 DON'T KNOW" FOR AN ANSWER AND INVESTIGATING THIS. I MEAN
22 WITH COMPUTERS THEY KEEP A LOT OF INFORMATION ABOUT THINGS
23 AND I THINK IF YOU TRY, YOU CAN FIND OUT WHAT HAPPENED.

24 **MR. SINCLAIR:** WE ARE TRYING.

25 **THE COURT:** OKAY. ANYTHING ELSE?

1 **MR. PULGRAM:** THANK YOU, YOUR HONOR.

2 **MR. SINCLAIR:** THANK YOU, YOUR HONOR.

3 **MR. TAYLOR:** THANK YOU.

4 **MS. CASTRO:** THANK YOU, YOUR HONOR.

5 (WHEREUPON, AT 3:10 P.M. THE PROCEEDINGS CONCLUDED.)

6 COURT REPORTER'S CERTIFICATE

7 I, STARR A. WILSON, CSR NO. 2462, UNITED
8 STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DO
9 HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
10 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

11 I CERTIFY THAT THE TRANSCRIPT FEES AND FORMAT
12 COMPLY WITH THOSE PRESCRIBED BY THE COURT AND JUDICIAL
13 CONFERENCE OF THE UNITED STATES.

14
15 /s/ _____

16 STARR A. WILSON, CSR NO. 2462
17
18
19
20
21
22
23
24
25

EXHIBIT 15

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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION

18 SUCCESSFACTORS, INC., a Delaware
19 corporation,

20 Plaintiff,

21 v.

22 SOFTSCAPE, INC., a Delaware
23 corporation; and DOES 1-10, inclusive,

24 Defendants.

Case No. CV 08-1376 CW

MANUAL FILING NOTICE

Date: September 3, 2008

Time: 10:00 a.m.

Courtroom: G, 15th Floor

Judge: Hon. Bernard Zimmerman

Date of Filing: July 30, 2008

Trial Date: May 11, 2009

25 **RE: CONFIDENTIAL EXHIBITS 1, 2, 3, 11, 12, 15, 16, 17, 18, 19, 21, 22, 28, . TO**
26 **THE DECLARATION OF HENRY Z. CARBAJAL IN SUPPORT OF MOTION TO**
27 **COMPEL PRODUCTION OF DOCUMENTS, FURTHER INTERROGATORY**
28 **ANSWERS AND PROPER PRIVILEGE LOGS**

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11 media

12 X Item Under Seal

13 _____ Conformance with the Judicial Conference Privacy Policy (General Order 53).

14 _____ Other (description): _____

15 Dated: July 30, 2008

FENWICK & WEST LLP

17 By: /s/ Patrick Premo
18 Patrick Premo

19 Attorneys for Plaintiff
20 SUCCESSFACTORS, INC.

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18 Patrick Premo

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14 UNITED STATES DISTRICT COURT
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18 Patrick Premo

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Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT
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18 Patrick Premo

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20 SUCCESSFACTORS, INC.

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June 24, 2008

VIA EMAIL AND U.S. MAIL

Liwen Mah, Esq.
Fenwick & West, LLP
555 California Street, 12th Floor
San Francisco, CA 94104

Re: SuccessFactors, Inc. v. Softscape, Inc.;
Case No.: C08-1376 CW (BZX)

Dear Mr. Mah:

We have received no answer to our inquiry as to which of SuccessFactors' flurry of recent letters should be addressed in which order. However, what follows are Softscape's brief responses to your June 12, 2008 letter concerning Softscape's supplemental responses to SuccessFactors' 1st RFPs, which are by no means exhaustive and can be discussed in more detail during an in-person meet and confer as required by Magistrate Zimmerman.

General Objections

As we indicated during our prior meet and confer sessions, we intend to withdraw general objections that go beyond privilege, privacy, improper instructions and definitions. This will be reflected in Softscape's forthcoming amended responses, where any objections will be specifically interposed where appropriate. We expect SuccessFactors to do the same.

General Objections About the Time Limits and Presentation scope

1. Time Limits

Softscape previously agreed to broaden its search for responsive documents as far back as February 1, 2007, which encompasses the timeframe in which SuccessFactors claims that the "genesis" of the Presentation/SIPP occurred. Requesting Softscape to conduct a general search further back than February 1, 2007 constitutes an improper fishing expedition by SuccessFactors and would unduly burden Softscape with unreasonable e-discovery costs. We do not believe that Mr. Watkins' deposition testimony or Softscape's interrogatory responses justify SuccessFactors' change in its prior position.

As demonstrated by Mr. Watkins' testimony, the SIPP was compiled well within the February 1, 2007 reach-back. *See, e.g.* Rough Deposition Transcript at pp. 147:12-148:15; *see*

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Liwen Mah, Esq.

June 24, 2008

Page 2

also id. at p. 139:4-5. Mr. Watkins further testified in deposition that SuccessFactors' customer attrition data was compiled in 2008, regardless of the dates the attrition covered. As a result, SuccessFactors has not provided an appropriate or compelling reason for Softscape to search beyond February 1, 2007 as to any general or specific line of inquiry.¹

2. Presentation

Softscape's reasons for the distinction between the Presentation and the SIPP are cogent and have been laid out many times during various meet and confer, as well as in its responses to SuccessFactors' Interrogatories. Nevertheless, as demonstrated by the agreed-upon search terms, Softscape is searching for documents responsive to matters pertaining to both the Presentation and SIPP.

General Objections about privilege with respect to FTI

Your concern lacks context as FTI is not specifically raised in the general objections. Suffice it to say that the attorney-client privilege extends to FTI, and privileged documents will be logged where appropriate. *In re Bieter Co.*, 16 F.3d 929, 933, 939-40 (8th Cir.1994); *U.S. v. Schwimmer*, 892 F.2d 237, 244, 29 Fed. R. Evid. Serv. 434 (2d Cir. 1989); *AMCO Ins. Co. v. Madera Quality Nut LLC*, 2006 WL 931437 **18-19 (E.D. Cal. Apr. 11, 2006); *Sanborn v. Parker*, 2007 WL 495202 *10 (W.D. Ky. Feb. 14, 2007); 81 Am. Jur. 2d Witnesses § 391. Otherwise, there is no obligation to log non-responsive privileged documents. *Federal Trade Com'n v. Digital Interactive Associates, Inc.*, 1997 WL 524905 *4 (D. Colo. March 17, 1997).

Repeated responses agreeing to produce "relevant" documents

As indicated in meet and confer regarding SuccessFactors' deficient responses, Softscape agrees to amend to replace "relevant" with "responsive" documents to fully comply with Rule 34, and expects SuccessFactors to do the same.

Specific Requests and Objections

Request No. 2

SuccessFactors has yet to identify any lost customers or potential customers or specify its alleged damages. Yet it believes it is entitled broadly to any documents concerning those who are "potential, intended, or actual recipients of the PRESENTATION." Limiting communications to those concerning the Presentation is a reasonable narrowing of an otherwise

¹ Without agreeing to SuccessFactors' amended response to Softscape's RFPs (Set One), Softscape notes that SuccessFactors has amended to itself object to the time period dating to January 1, 2005 on the basis that "there has been no showing that any part of the Presentation is older than two years." Thus, under SuccessFactors' own concession, there can be no basis for Softscape to search as far back as 2004 for these Requests.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Liwen Mah, Esq.
June 24, 2008
Page 3

overbroad request, and SuccessFactors has provided nothing to show how potential or intended recipients bear on the issues in this case. Documents and communications relating to parties wholly unrelated to the Presentation are irrelevant even under Rule 26's broad definition of relevancy, and certainly not sufficiently along the sliding scale of relevance to justify the invasion into Softscape's confidential and proprietary information.

Request No. 6

Your description of what this request is seeking is inconsistent with the conjunctive manner in which it is drafted. In that regard, this request seeks communications between Softscape, Sears, Regions Bank, Intelsat, Dave Sinkfield, ICMA Retirement, Harris-Williams, *and* current and former SuccessFactors employees.

With respect to the specific customers and individual identified in the request, Softscape has merely limited that request as it relates to the scope of this litigation (i.e. as such communications relate to the SIPP/Presentation and the truth of the matters asserted therein), which is entirely appropriate given that SuccessFactors has not gone beyond unsupported speculation as to conduct beyond matters pertaining to the Presentation. Notwithstanding the foregoing, Softscape has included these general search terms in its ESI search and will agree to amend its response to include all communications between Softscape and Sears, Regions Bank, Intelsat, Dave Sinkfield, ICMA Retirement, and Harris-Williams regarding SuccessFactors, which occurred between February 1, 2007 to the present.

Concerning communications with "any current or former SUCCESSFACTORS employee or consultant," there is no basis for going beyond those related to the facts contained in the SIPP/Presentation. Further, despite discovery previously propounded by Softscape, SuccessFactors has yet to produce documents sufficient to identify any of its current or former employees. Thus, it is premature for SuccessFactors to seek such communications when in most instances Softscape has no idea the specific identities of who may work or have worked for SuccessFactors.

Finally, with respect to communications with unidentified SuccessFactors customers and "prospective customers," the only relevant "customers" are those that SuccessFactors asserts that Softscape made untruthful statements about in the SIPP/Presentation and those it claims to have lost as a direct and proximately result of the statements made in the Presentation. Once SuccessFactors specifically identifies such "customers" in response to Softscape's interrogatories, Softscape is open to further meet and confer regarding the scope of this request.

Request No. 7-8

As stated, Softscape has agreed to go back as far as February 1, 2007. More broadly, the support for your positions is unclear. We can discuss these Requests and any remaining disagreement at an in-person meet and confer conference, the method for resolution specified by Magistrate Zimmerman. However, if you have further information to support your positions, which were a bit confusing, we will also consider that additional information.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Liwen Mah, Esq.

June 24, 2008

Page 4

Requests 10-12

SuccessFactors is simply not entitled to a mirror/forensic imaging of data storage media for David Watkins, Dennis Martinek or "any computer that was involved" with the Presentation. To provide SuccessFactors unfettered access to media that contains a wealth of non-responsive, irrelevant and highly confidential and private information is entirely improper. Softscape has indicated its willingness to search and produce documents in this litigation, and speculation that items will not be included in such production is not an adequate basis upon which to justify an intrusive mirror imaging of entire hard drives. *Memry Corp. v. Kentucky Oil Technology, N.V.*, 2007 WL 832937 **3-4 (N.D. Cal. Mar. 19, 2007); *see also Ameriwood Indus., Inc. v. Liberman*, 2006 WL 3825291 *4 (E.D. Mo. Dec. 27, 2006) ("[A] party may not inspect the physical hard drives of a computer merely because the party wants to search for additional documents responsive to the party's document requests."); *Bethea v. Comcast*, 218 F.R.D. 328, 330 (D.D.C. 2003); *Floeter v. City of Orlando*, 2006 WL 1000306 *3 (M.D. Fla. Apr. 14, 2006) (plaintiff "has not made any showing that he has requested information contained on these computer hard drives that the [defendant] has failed to produce"); *Balfour Beatty Rail, Inc. v. Vaccarello*, 2007 WL 169628 **2-3 (M.D. Fla. Jan. 18, 2007) (court denied motion to compel because "Plaintiff's requests simply seek computer hard drives. Plaintiff does not provide any information regarding what it seeks to discover from the hard drives nor does it make any contention that Defendants have failed to provide requested information contained on these hard drives.").

SuccessFactors' concerns are not sustainable at this stage in the litigation. Agreeing to search terms, as Softscape has done, is sufficient to avoid an order as broad and sweeping as imaging of storage media. *Calyon v. Mizuho Securities USA Inc.*, 2007 WL 1468889 **5-6 (S.D.N.Y. 2007) (refusing to order images to be produced to independent expert for search as unnecessary additional layer; defendants indicated willingness to conduct search and there was no reason to question their ability to completely search based upon agreed-upon search protocol).

In any event, the scope of the imaging requested is fatally overbroad. *Positive Software Solutions Inc. v. New Century Mortg. Corp.*, 259 F. Supp. 2d 561, 562-63 (N.D. Tex. 2003) (Denying request for image of servers and computers that potentially contained relevant evidence; "Imaging would include not only the files at issue, but also anything else that happened to be on a server containing one of those files, which could include irrelevant or privileged information not otherwise discoverable, possibly even including deleted files. The Court remains of the opinion that the scope of the proposed imaging is substantially overbroad.")

Request No. 13

Your description of what you hope to obtain in response to Request No. 13 is not consistent with the type of documents this request seeks. Contracts, licenses or agreements, whether in 'actual or prospective' form, do nothing to support SuccessFactors' case - especially those entered into prior to March 4, 2008 when the Presentation was disseminated by John Anonymous.

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Liwen Mah, Esq.
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Your "poaching" phraseology also reveals a fundamental defect with this request. As a general proposition, competition is not unlawful. This dispute is not about one competitor's "plans to poach" customers of another, but rather it is about a Presentation and the effect (if any) of its dissemination on customers and potential customers of SuccessFactors. Naturally, any such result harm would occur *after* March 4, 2008, and more importantly consistent with the allegations in SuccessFactors' Complaint.

Finally, SuccessFactors has yet to identify *any* alleged harm to its customer relations or lost customers resulting from the dissemination of the Presentation. Thus, Softscape should not be required to produce highly confidential contracts with any "customers" other than those referenced in the Presentation (if any such documents exist) or any recipients thereof. If SuccessFactors wishes to identify which customers or potential customers (e.g. identifiable prospective economic relationships that would have been commenced but-for the Presentation) were lost as a result of the Presentation, then Softscape will be in a position to search for and produce such documents related to those parties.

Request No. 14

The Request is limited to the parties named in it, and not those who used those names, as that would simply lead to a never-ending circle -- it will not be construed beyond comprehension "to include anyone falsely using it here." Softscape has included the names identified in the Request in its search terms and will produce resulting documents within the responsive time frame. That should resolve your concerns with respect to this request.

Request No. 15

It is only *use in commerce* of a mark that even qualifies for trademark infringement, and then only if it is likely to confuse as to the *source* of origin. It is for this reason that the Presentation, with its critique of SuccessFactors and reference to it in the third person, could never be confused as actually emanating from SuccessFactors. But even indulging the untenable theory that SuccessFactors' trademark is implicated by its use in the disseminated Presentation, internal use of trademarks is not use in commerce, and thus cannot constitute infringement. Internal use is thus not reasonably within the scope of discovery. Nevertheless, Softscape has produced a number of documents with SuccessFactors' name and logo. Please re-review the already produced documents first before we discuss this further. In any event, your reference to it being "quite possible" that other contexts occurred acknowledges the sheer speculation of any further discovery.

Request No. 16

The Request is directed at Plaintiff Softscape, not New Millenium or David Watkins (either as an individual, or in a separate capacity with New Millenium). Softscape has included search terms that cover New Millenium and will produce all such documents in its possession, custody and control. New Millenium Shoe is a separate company and not an alleged "shell company" as SuccessFactors inaccurately described in the case management statement. To the

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extent that SuccessFactors feels that Softscape's forthcoming production is insufficient, it should obtain further responsive documents *via* its third party subpoena to New Millenium, which is represented by Ron Davids' office.

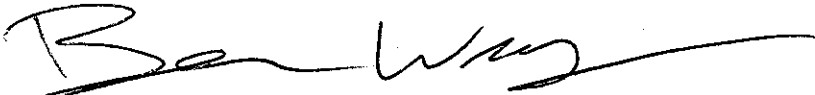
* * *

As stated above, this letter is merely a response to your prior letter and to provide talking points during an in-person meet and confer on any of responses in which SuccessFactors remains unsatisfied. We will be happy to schedule an in-person meet and confer discussion to address any such remaining issues.

Sincerely,

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

/s/ Ben Wagner

A handwritten signature in black ink, appearing to read "Ben Wagner", with a long horizontal flourish extending to the right.

Ben L. Wagner

BW/sb

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15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
corporation; and DOES 1-10, inclusive,

22 Defendants.
23
24

Case No. CV 08-1376 CW

MANUAL FILING NOTICE

Date: September 3, 2008
Time: 10:00 a.m.
Courtroom: G, 15th Floor
Judge: Hon. Bernard Zimmerman
Date of Filing: July 30, 2008
Trial Date: May 11, 2009

25 **RE: CONFIDENTIAL EXHIBITS 1, 2, 3, 11, 12, 15, 16, 17, 18, 19, 21, 22, 28, . TO**
26 **THE DECLARATION OF HENRY Z. CARBAJAL IN SUPPORT OF MOTION TO**
27 **COMPEL PRODUCTION OF DOCUMENTS, FURTHER INTERROGATORY**
28 **ANSWERS AND PROPER PRIVILEGE LOGS**

This filing is in paper or physical form only, and is being maintained in the case file in the Clerk's office.

If you are a participant on this case, this filing will be served in hard-copy shortly.

For information on retrieving this filing directly from the court, please see the court's main web site at <http://www.cand.uscourts.gov> under Frequently Asked Questions (FAQ).

This filing was not efiled for the following reason(s):

☐ Voluminous Document (PDF file size larger than efileing system allowances)

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☐ Physical Object (description): _____

☐ Non Graphical/Textual Computer File (audio, video, etc.) on CD or other media

☒ Item Under Seal

☐ Conformance with the Judicial Conference Privacy Policy (General Order 53).

☐ Other (description): _____

Dated: July 30, 2008

FENWICK & WEST LLP

By: /s/ Patrick Premo
Patrick Premo

Attorneys for Plaintiff
SUCCESSFACTORS, INC.

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15 UNITED STATES DISTRICT COURT
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☐ Conformance with the Judicial Conference Privacy Policy (General Order 53).

☐ Other (description): _____

Dated: July 30, 2008

FENWICK & WEST LLP

By: /s/ Patrick Premo
Patrick Premo

Attorneys for Plaintiff
SUCCESSFACTORS, INC.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

EXHIBIT 23



SOLUTIONS

PRODUCTS

SERVICES

COMPANY

CONTACT BLOG

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Softscape Acknowledges Limited Preliminary Injunction in Lawsuit

FOR IMMEDIATE RELEASE

Wayland, MA – March 31, 2008 - **Softscape**, the global leader in integrated people management software, today announced it appreciates the decision by the District Court for the Northern District of California to limit the preliminary injunction requested by SuccessFactors (NASDAQ:SFSF). Softscape issued this statement:

"While the full truth of this complex case can only be revealed through the litigation process, as opposed to public relations tactics, SuccessFactors continues to mischaracterize numerous details surrounding this case, including references to New Millenium Shoe Corp., which has been doing business for more than 20 years.

"Softscape is taking this matter very seriously as it continues its own investigation, and respects the Court's careful consideration on this matter. Softscape does not condone the use of this type of tactic during the sales process, and the company has specifically instructed its sales force not to engage in any dissemination of the presentation.

"This is an unfortunate event that shows just how competitive our market has become. As a pioneer in the human resources technology industry, we are focused on what we do best: helping our customers achieve bottom-line results. We are infinitely passionate and 100 percent dedicated to our customers, our hard-working employees, and this industry. Our profitable operations and extremely high customer satisfaction and retention rates are true testaments to these efforts."

About Softscape (www.softscape.com)

Softscape is the global leader in integrated people management software that enables organizations to more effectively drive their business performance. Recognized by industry analysts as the most comprehensive strategic human capital management solution, Softscape provides complete employee lifecycle management, including a core system of record, in a single, integrated platform for improved business intelligence. The company offers customers of all sizes and in all industries the most flexibility and choice with multiple purchase, configuration, and deployment options. For more than a decade, Softscape has helped millions of workers across 156 countries be more successful at their jobs while contributing to bottom-line results. Softscape's customers represent Fortune 500/Global 500, mid-market, and government organizations, including Proctor & Gamble, Barclays, AstraZeneca, Seagate, GKN, Edcon, LandAmerica, and the U.S. Department of Homeland Security. Softscape is based in Massachusetts with offices in London, Sydney, New York City, Chicago, San Francisco, Hartford, Washington, D.C., Bangkok, Hong Kong, and Johannesburg.

The Softscape logo and marks related to Softscape products are either trademarks or registered trademarks of Softscape, Inc. Other brand and product names contained herein may be trademarks or registered trademarks of their respective holders.

Media Contact

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cfaust@s

White Papers

-  [State of the](#)
-  [Employee E](#)
-  [Succession](#)
-  [Pay-for-Per](#)

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June 14, 2008

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VIA ELECTRONIC AND U.S. MAIL

HIGHLY CONFIDENTIAL—ATTORNEYS' EYES ONLY

Jeffrey Ratinoff, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
1400 Page Mill Road
Palo Alto, CA 94304-1124

Re: *SuccessFactors, Inc. v. Softscape, Inc.*,
Case No.: C-08-1376 (CW)

Dear Jeff:

I write to address specific amended objections Softscape made on May 19, 2008 with respect to SuccessFactors' Second Set of Requests for Production of Documents. Softscape's objections unreasonably narrow the scope of Softscape's production and would unacceptably hold back important, relevant documents.

General Objections

In meet-and-confer sessions, Softscape has questioned SuccessFactors' use of general objections in responses to Softscape's discovery requests, but I note that Softscape has seen fit to list ten general objections in its own responses. Softscape has taken an inconsistent stance with respect to the use of general objections by Softscape versus their use by SuccessFactors. As we have indicated during our meet-and-confer discussions, we expect that Softscape will tell us, as SuccessFactors has agreed to tell you, the extent to which Softscape is withholding or otherwise in any way limiting discovery based on these general objections. Please advise.

That notwithstanding, at least a few certain general objections have obvious, more specific flaws:

1. General Objections about the time limits and Presentation scope

It is clear from Softscape's interrogatory responses and deposition testimony that the Presentation involved multiple iterations and collection of information since at least 2004. Thus Softscape's General Objection No. 5 that it should not have to produce documents older than January 1, 2008 is an unreasonable time restriction. For example, Softscape began collecting SuccessFactors' customer attrition data at least as long ago as autumn of 2004 and began setting up New Millenium Shoe as a potential SuccessFactors customer prior to January 2008. It also appears that Softscape accessed password protected areas in violation of the Computer Fraud and Abuse Act prior to January 2008. Responsive documents about these and other topics are surely dated before January 1, 2008.

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Similarly, it is clear that the Presentation underwent several iterations. Since the creation and authorship of the Presentation are not only relevant, but critical, to this case, General Objection No. 9 unreasonably restricts the term “PRESENTATION” to simply the document Bates labeled as SF00000001-SF00000043. Pretending that “PRESENTATION” does not include the various versions of the Presentation—including what Softscape chooses to refer to as the “SIPP” in its interrogatory responses—is unjustified. To the extent that Softscape wishes to use different terminology for the Presentation, SuccessFactors maintains that each discovery request about the Presentation necessarily encompasses all of the various versions of the Presentation or the SIPP, however you choose to refer to it. Please advise if you are willing to include all such materials.

2. General Objections about privilege with respect to FTI

As you know, SuccessFactors has been frustrated by the fact that Softscape has so far failed to produce core documents relating to the investigation of the Presentation and its dissemination, even though Softscape had retained FTI to assist with such an investigation in March 2008, three months ago. In light of FTI’s collection efforts, Softscape cannot claim that its lack of production is because it does not yet have the documents. Based on the privilege logs that Softscape has thus far submitted, Softscape also does not appear to be claiming that the bulk of the documents collected by FTI are privileged. Thus we seek confirmation that Softscape will produce the documents collected by FTI, rather than withhold them under some vague assertion of privilege not yet disclosed.

3. Repeated responses agreeing to produce “relevant” documents

In each response in which Softscape agrees to produce documents, Softscape purports to limit its production to “relevant” documents. This is not the standard for discovery under the Federal Rules, nor is it appropriate for Softscape to impose its own unilateral view of relevancy. We therefore require Softscape to produce responsive documents within the scope of the requests, not merely documents that it subjectively deems to be “relevant.” We therefore insist that you confirm that Softscape will eliminate this limitation entirely, as you suggested during previous meet and confer sessions. If Softscape has a scope of objection, it can describe the scope of that objection, but a vague filter of “relevancy” is unacceptable.

Specific Requests and Objections

In addition to the above, SuccessFactors notes the following flaws to Softscape’s objections to SuccessFactors’ specific requests for documents.

Request No. 17

To be clear, the Request seeks not only actual press releases, but documents concerning those releases, including drafts never released, communications about those releases, and plans for those releases. Such documents are highly relevant as to Softscape’s acts, knowledge, and intentions in issuing those releases, republishing false information, and causing injury to SuccessFactors. These documents may also show participation by third parties (such as Mr. Kutik or others) that bear on bias or assertions of privilege. Thus Softscape’s attempt to

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narrowly limit production to just documents that “contain” press releases about this action is an unreasonable limitation.

Given the short period since the commencement of this action and the modest number of press releases, it is hardly a burden to produce documents concerning actual or planned press releases, as SuccessFactors requested.

Request No. 19

Softscape’s response appears to be a wholesale refusal to produce documents showing its actual and prospective customers as of when John Anonymous sent the Presentation. Contrary to Softscape’s assertion, a showing of Softscape’s customers is both relevant and likely to lead to discovery of admissible evidence. Among other things, first, the origin of John Anonymous’s long list of customer recipients is at issue. Softscape’s list of customers as of March 4, 2008 is highly probative of the source of that list and Softscape’s involvement in the Presentation’s dissemination. Second, the list is highly probative of whether Softscape has customers that do not allow their names to be used as references. Third, the list would identify prospective customer deals that Softscape consummated after the creation and distribution of the Presentation. Furthermore, the burden on Softscape is modest, since SuccessFactors asks only for documents sufficient to identify the customers, not all documents. There is no sound basis for Softscape’s refusal to produce.

Request No. 20

Obviously communications with the recipients of John Anonymous’s gmail are highly relevant, *inter alia*, as to John Anonymous’s identity. In addition, overlap of communications by Softscape with these recipients and John Anonymous’s communications with the same group will be probative of Softscape’s responsibility and the source of John Anonymous’s list. Communications with such persons after receipt of the Presentation will also be relevant to the impact of the Presentation, as well as the way that Softscape was responding—whether it did anything to mitigate the damage from the dissemination or rather ratified and sought to benefit from it.

Softscape’s response inexplicably mischaracterizes a search for such communications as potentially burdensome and extensive. It is hard to understand how an electronic search for a finite set of individuals’ unique e-mail addresses would be excessively costly or burdensome. The requested time period is short, limited to this calendar year. Moreover, since the bulk of the e-mail addresses are tied to specific individuals who probably do not often correspond with Softscape, the requested search is unlikely to turn up a large number of documents. Nevertheless, the documents that do turn up will likely be critical to revealing who disseminated the Presentation and why. While SuccessFactors is willing to confer in the unlikely event that the search turns up an unwieldy number of nonresponsive documents, SuccessFactors expects that Softscape should have little problem meeting this request.

Request Nos. 21, 27

These Requests seek communications involving individuals who sent or received e-mails shortly after the dissemination of John Anonymous’s gmail. In its responses to these Requests,

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Softscape repeats an unacceptable limitation, restricting production to documents “relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.” SuccessFactors Requests are not so limited, nor should they be.

Although the individuals or email accounts described in these Requests appear to have communicated directly on March 5, 2008 about the Presentation, their communications on other occasions with Softscape’s customers are relevant to establishing the identity, use and purpose of these email accounts, and to show Softscape’s broader scheme for targeting customers with calumny about SuccessFactors. Softscape’s attempt to rewrite the Requests for SuccessFactors is inappropriate, and Softscape should produce documents without any limitation as to whether the documents pertain to the Presentation.

Request Nos. 22-25

These Requests pertain to communications involving key individuals who, *inter alia*, played a significant role in strategizing how to attack SuccessFactors, pretexting as SuccessFactors’ customer, accessing SuccessFactors information and systems, or attempting to bolster Softscape’s position with its customers after the filing of this action. In its responses to these Requests, Softscape recycles an unacceptable limitation, restricting production to documents “relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.” SuccessFactors Requests are not so limited, nor should they be.

The communications sought by these Requests might not relate to the Presentation yet still be highly relevant as to who Softscape deemed to be receptive to anti-SuccessFactors marketing efforts and why, and to show additional false advertising, representations, and statements about SuccessFactors. The communications with customers are also highly relevant as to the injury to SuccessFactors and its goodwill from the misuses of its proprietary information and false statements other than the Presentation. SuccessFactors is willing to narrow these Requests to communications that relate to the Presentation, its contents, SuccessFactors, this litigation, or any recipient of the Presentation, including but not limited to the recipient’s of John Anonymous’s gmail. Any further limitation by Softscape is unacceptable.

Request No. 26

I believe that your response meant to say that Softscape will produce communications between Softscape and wildgracks@yahoo.com, not “between wildgracks@yahoo.com.” Please confirm.

Softscape also attempts to limit its production to documents “relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION.” This is unacceptable. SuccessFactors Request is not so limited. This e-mail address appears to be that of Dennis Martinek, who chose this email address, rather than his Softscape address, to communicate with John Anonymous during business hours. This suggests that this email is used for business purposes relating to unfair competition, which makes communications from it particularly important. Further, on at least one occasion Martinek falsely posed as a customer of SuccessFactors in order to obtain information that SuccessFactors would not have freely given to a competitor. Thus it is likely that communications between his private e-mail address and Softscape will help reveal the extent of Softscape’s pretexting, and not just as it relates to the

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Presentation. Furthermore, since the e-mail address is ostensibly for Mr. Martinek's private use, not his Softscape e-mail address, the volume of communications for the narrowly tailored period should be reasonable. Thus SuccessFactors insists on the production of all the communications, not merely those relating to the Presentation or its contents.

Request Nos. 28-29

These Requests pertain not only to the Presentation and its contents, but also to Softscape's role in strategizing how to attack SuccessFactors, pretexting as SuccessFactors' customer, accessing SuccessFactors information and systems. The Requests are also highly relevant to the extent of injury flowing from such activities. In its responses to these Requests, Softscape improperly attempts to limit its production to documents "relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION." SuccessFactors Requests are not so limited, nor should they be.

Documents concerning recipients of information obtained through the New Millenium Shoe ruse (Request No. 28) are relevant to show who obtained and used the information fraudulently obtained, and what use was made of it, whether that information eventually made it into the Presentation or not. SuccessFactors is obviously entitled to documentation of who received the Contract Proposal fraudulently obtained, and who received reports from those who reviewed the ACE 275 account, regardless of whether those, or any other materials obtained from SuccessFactors, made it into the Presentation. This information will also show who cooperated and participated in the New Millenium Shoe scheme, who may have supplied content for the Presentation, who may have wrongly disseminated the ill-gotten information obtained from SuccessFactors and how far it may have been disseminated, regardless of whether they mention of the Presentation. Likewise, documents discussing information obtained from SuccessFactors by New Millenium Shoe (Request No. 29) are equally relevant, regardless of whether they mention the Presentation or discuss other information illicitly obtained. They are relevant to, *inter alia*, Softscape's liability for CFAA violations, the extent of injury to SuccessFactors from such violation, Softscape's intent to harm SuccessFactors and misuse information, and how Softscape used or mischaracterized the information obtained from SuccessFactors. Softscape's attempt to rewrite the Requests for SuccessFactors is inappropriate, and Softscape should produce documents without any limitation as to whether the documents pertain to the Presentation.

In addition, the Request seeks documents concerning recipients of any documents *or information* provided to New Millenium Shoe, Ely Valls, or Javier Cruz. Since there were live interactions between these persons and SuccessFactors, it is clear that they received information, not just documents, and Softscape's purported limitation to recipients or discussions of "documents" is inappropriate.

In addition, now that Softscape has revealed Javier Cruz to be a "nom de plume" of David Watkins, they should be treated as one person for the purposes of this Request, and we need your confirmation that that Javier Cruz is construed to include David Watkins.

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Request Nos. 30, 33-39

These Requests pertain to access between Softscape computers and certain other parties or IP addresses. Softscape in each response has attempted to narrow production to documents concerning access between those IP addresses and "Softscape IP addresses." This narrowing is unacceptable because of the possibility that Softscape computers accessed the other parties or IP addresses without first connecting through Softscape's network. Softscape has acknowledged that some of its computers are laptops that can be used remotely. Softscape must produce documents not only about access involving Softscape IP addresses, but also Softscape computers not connected to Softscape's networks.

Separately, in our June 11, 2008 meet-and-confer, you requested the courtesy of more information about the IP addresses in these Requests to aid Softscape's searches.

For your convenience, the IP addresses are as follows:

74.94.170.178	Courtyard Marriott as shown in its subpoena response
65.96.237.54	Dave/Lillian Watkins
65.96.233.62	Identified in Network Solutions' subpoena response
62.140.137.160	Identified in Network Solutions' subpoena response
217.188.122.88	Identified in Network Solutions' subpoena response
82.108.171.66	Softscape UK
24.34.56.79	Rick Watkins
98.216.168.122	Dave/Lillian Watkins

Request Nos. 30-31

Softscape's responses purport to limit the production to documents concerning access until March 4, 2008. Because of the possibility that John Anonymous conducted activity after March 4, 2008, this date should be extended until at least March 31, 2008, which should pose marginal burden on Softscape. In addition, as illustrated by the examples of documents listed in Request No. 31, documents relevant to the identity of John Anonymous would not necessarily relate "to the PRESENTATION or any facts contained or statements made in the PRESENTATION." Also, documents showing interaction between the Courtyard Marriott's IP address and Softscape may suggest who historically used the Courtyard Marriott to communicate with Softscape. For Request Nos. 30-31, SuccessFactors therefore insists that Softscape produce the requested documents, irrespective of whether they relate to the Presentation or its contents.

Request No. 32

Proposed or actual licenses and the like are highly probative of Softscape's intentions with respect to the Presentation, the targets of the Presentation, and damages. The time period is modest, being limited to this calendar year, so the breadth is reasonable.

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Request No. 33

I believe the response meant to list 65.96.237.54 as the IP address. Please confirm.

In addition, Softscape's attempt to limit its production to documents "relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION" is unacceptable. The household associated with this IP address is that of Dave Watkins, who admittedly was not only involved with the Presentation, but also, for example, with New Millenium Shoe, access of SuccessFactors' demonstration environment, and planning of attacks on SuccessFactors. Further, the time of log ins can evidence Mr. Watkins' whereabouts and activities during critical time periods. Given that Dave and Lillian Watkins likely accessed Softscape's computers for a wide variety of reasons unrelated to this case, SuccessFactors is willing to narrow its request to the following: ALL DOCUMENTS (i) reflecting logs of connection times between SOFTSCAPE servers or computers and the IP address 65.96.237.54, or (ii) CONCERNING access to SOFTSCAPE servers or computers from the IP address 65.96.237.54, that relate to SuccessFactors, New Millenium Shoe, or the dates and times when such access occurred.

Request Nos. 34-36

These Requests pertain to who accessed New Millenium Shoe's web-hosting account and why. Softscape's attempt to limit its production to documents "relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION" is misplaced and inappropriate because many relevant documents about use of the New Millenium Shoe may not be ostensibly about the Presentation or its contents. For instance, a document showing that Dave Watkins accessed the New Millenium Shoe account, which he has not denied, or changed the webpage to facilitate pretexting would likely have no mention of the Presentation yet be highly relevant to show the scheme by Softscape to access SuccessFactors' confidential information without authorization in violation of the CAFA. Furthermore, there should be little legitimate reason for these IP addresses associated with New Millenium Shoe to access Softscape's computers, so the volume of responsive documents should be reasonable. For these Requests, Softscape must produce documents regardless of whether they relate to the Presentation or its contents.

With respect to Request No. 34, I believe the response meant to list 65.96.233.62 as the IP address. Please confirm.

Request Nos. 37-39

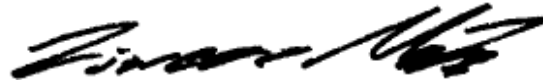
As with Request No. 33, Softscape's attempt to limit its production to documents "relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION" is unacceptable. The Softscape UK office and the Watkins households associated with these IP addresses may have been involved with the Presentation, but also, for example, are implicated in accessing SuccessFactors' demonstration environment and planning attacks on SuccessFactors. Given that the Softscape UK office and the Watkins households likely accessed Softscape's computers for a wide variety of reasons unrelated to this case, SuccessFactors is willing to narrow these Requests as defined for Request No. 33.

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Request No. 42

Softscape recycles an unacceptable limitation, restricting production to documents “relating to the PRESENTATION or any facts contained or statements made in the PRESENTATION,” or relating to “access to the ACE 275 Sales Demo.” The individual associated with vallsely@hotmail.com is pertinent not only for her role in creating or disseminating the Presentation, but also for conduct that might not have directly related to the Presentation. Likewise, the ACE275 demonstration is just one facet of the pretexting that occurred. Documents highly relevant to the plan to fraudulently obtain competitors’ information without authorization might not specifically mention ACE275, such as emails about obtaining the Contract Proposal, about revising the website, or about pretexting other competitors like Taleo. Furthermore, the volume of communications with a single third-party email address is likely to be modest and reasonable. SuccessFactors is entitled to demonstrate how Softscape used Ely Watkins as a tool or agent for various purposes. Softscape’s attempt to rewrite the Requests for SuccessFactors is inappropriate, but to accommodate concerns over personal communications, SuccessFactors is prepared to exclude “communications of a purely personal nature that are unrelated to SOFTSCAPE’s business, SUCCESSFACTORS or other competitors of SOFTSCAPE, or NEW MILLENIUM SHOE.”

Very truly yours,

A handwritten signature in black ink, appearing to read "Liwen Mah", with a stylized flourish at the end.

Liwen Mah

cc: Bryan Sinclair, Esq.
Ben Wagner, Esq.

EXHIBIT 25

MINTZ LEVIN

Jeffrey Ratinoﬀ | 650 251 7755 | jratinoﬀ@mintz.com

1400 Page Mill Road
Palo Alto, California 94304-1124
650-251-7700
650-251-7739 fax
www.mintz.com

July 9, 2008

VIA ELECTRONIC AND U.S. MAIL

Liwen Mah, Esq.
Fenwick & West LLP
555 California St #1200
San Francisco, CA, 94104

Re: *SuccessFactors, Inc. v. Softscape, Inc.*; Case No.: C08-1376 CW (BZ)

Dear Liwen:

I am writing in response to your June 14, 2008 letter regarding Softscape's responses to SuccessFactors' Second Set of Requests for Production with the hope of narrowing the issues for discussion at tomorrow's meet and confer.

Prior Meet and Confer Agreements

As you may know, Patrick Premo and I engaged in a lengthy meet and confer session over these responses on May 27, 2008 where several agreements were reached. Thus, to the extent that your letter is inconsistent with those agreements, we will insist that they take precedence.

General Objections

As we indicated during our prior meet and confer sessions, we agreed to withdraw general objections that go beyond privilege, privacy, improper instructions and specific definitions. This will be reflected in Softscape's forthcoming amended responses. We expect SuccessFactors ("SFI") to do the same.

General Objections About the Time Limits and Presentation Scope

1. Time Limits

Softscape previously agreed to broaden its search for responsive documents as far back as February 1, 2007 (unless otherwise limited to January 1, 2008 by SFI's requests), which encompasses the timeframe in which SFI claims that the "genesis" of the Presentation/SIPP occurred. Requesting Softscape to conduct a general search further back than February 1, 2007 constitutes an improper fishing expedition by SFI and would unduly burden Softscape with unreasonable e-discovery costs. We do not believe that Mr. Watkins' deposition testimony or Softscape's interrogatory responses justify SFI's change in its prior position.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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As demonstrated by Mr. Watkins' testimony, the SIPP was compiled well within the February 1, 2007 reach-back. *See, e.g.* Rough Deposition Transcript at pp. 147:12-148:15; *see also id.* at p. 139:4-5. Mr. Watkins further testified in deposition that SFI's customer attrition data was compiled in 2008, regardless of the dates the attrition covered. As a result, SFI has not provided an appropriate or compelling reason for Softscape to search beyond February 1, 2007 as to any general or specific line of inquiry.¹

2. Presentation

Softscape's reasons for the distinction between the Presentation and the SIPP are cogent and have been laid out many times during various meet and confer, as well as in its responses to SFI's Interrogatories. Nevertheless, as demonstrated by the agreed-upon search terms, Softscape is searching for documents responsive to matters pertaining to both the Presentation and SIPP.

General Objections About Privilege With Respect to FTI

Your concern regarding objects relating to FTI lacks context as FTI is not specifically raised in the general objections. Nonetheless, the attorney-client privilege extends to FTI. *In re Bieter Co.*, 16 F.3d 929, 933, 939-40 (8th Cir.1994); *U.S. v. Schwimmer*, 892 F.2d 237, 244, 29 Fed. R. Evid. Serv. 434 (2d Cir. 1989); *AMCO Ins. Co. v. Madera Quality Nut LLC*, 2006 WL 931437 **18-19 (E.D. Cal. Apr. 11, 2006); *Sanborn v. Parker*, 2007 WL 495202 *10 (W.D. Ky. Feb. 14, 2007); 81 Am. Jur. 2d Witnesses § 391. Otherwise, there is no obligation to log non-responsive privileged documents. *Federal Trade Com'n v. Digital Interactive Associates, Inc.*, 1997 WL 524905 *4 (D. Colo. March 17, 1997).

Repeated Responses Agreeing to Produce "Relevant" Documents

As I represented to Mr. Premo during our prior meet and confer, Softscape agrees to amend to replace "relevant" with "responsive" documents to fully comply with Rule 34. We note that none of SFI's responses, including its recently served amended response to Softscape's First Set of Document requests contain such language. Accordingly, we expect SFI to provide similar Rule 34-compliant responses without further meet and confer.

¹ We note that in its own responses to Softscape's discovery, SFI has objected to requests seeking documents for the time period dating to January 1, 2005 to the present as overbroad on the grounds that "there has been no showing that any part of the Presentation is older than two years." Thus, under SFI's own concession, there can be no basis for Softscape to search as far back as 2004 for these Requests.

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Specific Requests and Objections

Request No. 17

Your explanation of the relevancy of post-lawsuit press releases remains unclear in relation to the allegations and claims asserted in the Complaint. Further, any such press release is subject to protection under California's litigation privilege (Cal. Civ. Code § 47). Nonetheless, we have produced a number of non-privileged documents relating to post-lawsuit press releases. Further, we have already produced at least one email between Mr. Kutik and Dave Watkins, and have included a search term to capture additional emails with Mr. Kutik. As we have previously explained, Mr. Kutik was not retained by Softscape and therefore your expectations concerning additional documents should be tempered accordingly.

Finally, we will not agree to log any post-filing privileged communications. We note that SFI has taken the position in its own discovery responses that logging privileged communications occurring after the lawsuit was improper and unduly burdensome.

Request Nos. 19 and 20

As explained to Mr. Premo during prior meet and confer, it is Softscape's position that its customers and prospects and information related thereto constitute highly sensitive proprietary and trade secret information that is not relevant to SFI's claims. Indeed, it is SFI's customers and prospects that are at issue, not those of Softscape. Furthermore, there are no allegations in the Complaint concerning Softscape's alleged wrongdoing beyond the creation and dissemination of the Presentation. Thus, SFI is not entitled to engage in a fishing expedition with respect to Softscape's most sensitive proprietary information and trade secrets.

We are now in receipt of your interrogatory responses and understand that there are sixteen prospective customers that SFI contends Softscape allegedly interfered with SFI's prospective economic relations with those customers and will agree to produce communications with those companies (if they exist) relating to the allegations in the Complaint under the following conditions: (1) SFI re-designate the identity of those customers as "Confidential" so that Softscape may conduct a reasonable and diligent search without violating the Protective Order; (2) SFI further certify under the penalty of perjury that these are the only prospective customers at issue as of the date of such certification because SFI's interrogatory responses are not entirely clear as to whether it is just these sixteen prospective customers at issue; and (3) SFI produce documents and communications establishing a prospective economic relationship and/or reasonable expectation of an economic benefit with those sixteen companies.

Likewise, SFI is not entitled to broaden discovery into to such highly sensitive information - regardless of the existence of the Protective Order - to explore the issue of dissemination. Obtaining unfettered access to Softscape's sensitive customer information is both unwarranted and not narrowly tailored enough even under the highest level under the Protective Order. In that regard, we are open to discussing alternatives that are less intrusive than Softscape

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producing its entire customer database to determine whether there are commonalities between the John Anonymous recipient list and contacts in Softscape's confidential database.

Request No. 21

As drafted, Request No. 21 does not merely cover communications that occurred shortly after the Presentation was disseminated. Rather, this request seeks communications between January 1, 2008 to the present. Request No. 21 is also overbroad because there is no limitation on the subject matter of the requested communications between Softscape and its customers. This broad time scope, coupled with the lack of limitation on the subject matter of the communications called for by this request make it both overbroad and unduly burdensome.

Further, as stated above, SFI does have a justifiable reason to seek broad discovery into Softscape's customer relations. Further, your letter indicates that SFI is concerned with communications that relate to the dissemination of the Presentation (and presumable reactions thereto). Thus, it is unclear why SFI believes that Softscape's reasonable limitation of the subject matter of such communications to the Presentation, and facts contained or statements made in the Presentation is unreasonably narrow.

Request Nos. 22-25

Your description of what SFI hopes to obtain in response to Request Nos. 22-25 and how these requests are drafted is inconsistent. As drafted, these requests are overbroad because there is no limitation on the subject matter of the requested communications between Softscape and its customers.

As stated above, SFI does not have a justifiable legal or factual basis to seek broad discovery into Softscape's highly sensitive and confidential relationships with its actual and prospective customers - especially those of which SFI has no existing or reasonably certain prospective economic relationship. Softscape's position is supported by controlling case law.

For example, with respect to SFI's intentional interference with prospective economic advantage claim, it must identify customers or prospects that it believes it was competing against Softscape during the relevant time period before obtaining any information relating to Softscape's customers. See *Blank v. Kirwan*, 39 Cal.3d 311, 330-31 (1985) (plaintiff must identify specific "economic relationships" and cannot rest on a mere "hope for an economic relationship and a desire for future benefit"); accord *Pardi v. Kaiser Found. Hosps.*, 389 F3d 840, 852-853 (9th Cir. 2004) (threshold requirement under California law is the existence of an economic relationship between plaintiff and a third party with the probability of future economic benefit to plaintiff).

SFI must also plead and prove an intentional act that is "independently wrongful," i.e., "wrongful by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 392-393 (1995); accord *Korea Supply Co. v. Lockheed Martin*

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Page 5

Corp., 29 Cal.4th 1134, 1153-1154 (2003). At this time, the only independent wrongs alleged in the Complaint that appear to go beyond the act of the interference itself and would arguably give SFI access to Softscape's customer information is the dissemination of the Presentation and the effect (if any) on SFI's prospective customers, which number sixteen.

Consequently, it is unclear why SFI believes that Softscape's reasonable limitation of the subject matter of the communications with its customers, that are called for by these requests to the Presentation, and facts contained or statements made in the Presentation is unreasonably narrow. In fact, this would go beyond communications with those sixteen prospective customers.

Request Nos. 26

As demonstrated by Softscape's response to this request and the list of search terms, Softscape has agreed to search for and produce communications between Softscape and wildgracks@yahoo.com related to the Presentation or any facts contained or statements made in the Presentation that are in its possession, custody or control.

During the May 27, 2008 meet and confer between myself and Mr. Premo I proposed to also include communications between wildgracks@yahoo.com and SFI. Mr. Premo did not indicate whether this would be an acceptable amendment and indicated he would get back to me with a final answer. Our offer still stands.

Finally, since SFI issued a subpoena to Dennis Martinek concerning relevant communications from this Yahoo! email address and Mr. Martinek has agreed to substantially comply therewith, there no longer appears to be any controversy as to Softscape's response to this request.

Request No. 27

Softscape will amend its response to Request No. 27 to include responsive communications between William Hurley/Hurly and Softscape from January 1, 2008 to the present. Further, since Softscape agreed to include search terms that would generate any such documents, there does not appear to be any further issue with this Request.

Request Nos. 28-29

We do not agree with your characterization of what categories of documents Request Nos. 28 and 29 call for Softscape to produce. Nonetheless, Softscape already agreed to reasonably comply with this request. To that end, Softscape has already produced documents responsive to this request, including communications between New MillinumShoe/Ely Valls and SFI. Softscape has included appropriate search terms in its search term list and will produce any further documents related to the alleged "New Millenium scheme." Thus, no further amended response is required to these requests.

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Request Nos. 30, 33-39

During a May 27, 2008 meet and confer session, Mr. Premo indicated that SFI would identify the IP addresses and would accept Softscape's responses as-is with the exception of extending the time and date cut-off from March 4, 2008 to March 11, 2008 since SFI conceded that these requests simply seek internet/IP address access logs. Thus, since you have identified the IP addresses, Softscape will amend its responses as previously discussed. With respect to Request Nos. 33 and 34, Softscape previously agreed to fix the typos with respect to the IP addresses identified in its responses.

Request No. 31

As we previously informed various members of your team, the time period offered in Softscape's response was reasonable, and to date, Softscape has not located any responsive documents relating to Softscape's use of the Waltham Courtyard Marriot as Softscape does not use this hotel for any purpose. However, Softscape agreed to include "Marriot" as an ESI search term at SFI's request and will produce any responsive documents within the agreed-upon time period. Thus, we do not believe there should be any further controversy with this request.

Request No. 32

During a May 27, 2008 meet and confer session, Mr. Premo acknowledged that this request was overbroad as drafted and therefore SFI was willing to narrow the scope of this request. Your letter fails to provide a reasonable narrowing of Request No. 32.

In response to an apparent recanting of this concession and agreement, as stated above, SFI is not entitled to discovery concerning Softscape's customer relationships. Indeed, it is highly suspect how actual or proposed licensing agreements, proposals and customer communications with all of Softscape's customers could possibly provide information to support SFI's alleged damages. Other than particular documents (if they exist) pertaining to the sixteen prospective customers identified in SFI's interrogatory responses, such information is not relevant or probative of SFI's alleged damages.

More importantly, SFI's continued insistence that Softscape provide this type of information is illustrative of Softscape's concern that SFI is using this lawsuit as a fishing expedition to gain access to competitive information to which it is otherwise not entitled to have access. Since Softscape has agreed in response to Request No. 21 to provide any communications between Softscape and its customers concerning the Presentation, such communications (if any exist) should be sufficient to provide the information that SFI claims would support its case.

Request No. 42

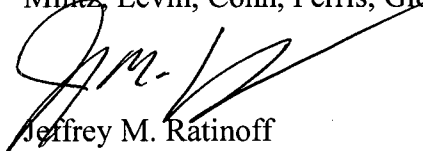
Mr. Premo previously acknowledged that as drafted, this request would require the production of personal family communications between Dave Watkins and Ely Valls having no bearing on the

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July 9, 2008
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present lawsuit. Consequently, Softscape's limitations to the subject matter of this lawsuit is entirely reasonable. To that end, Softscape has included specific terms for Ely Valls and her email address in its ESI searches.

Sincerely,

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

A handwritten signature in black ink, appearing to read "J.M. Ratinoff", is written over the printed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jeffrey M. Ratinoff

JR/sb

EXHIBIT 26



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SERVICES

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Industry Recognition
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Softscape Successful Against Rival SuccessFactors' Frivolous Lawsuit

FOR IMMEDIATE RELEASE

Wayland, MA – March 14, 2008 - Softscape, the global leader in integrated people management software, today released this statement in response to the lawsuit filed by SuccessFactors (NASDAQ:SFSF) that was announced March 12, 2008:

"The SuccessFactors lawsuit remains a frivolous abuse of the legal system, and we will defend ourselves to the fullest extent. The announcement released by SuccessFactors on March 13, 2008 deliberately misstated Softscape's general counsel's testimony, and ignored key facts contained in the complete statement. (http://www.softscape.com/pdf/doc/TRO_Declaration080312.pdf)

"Softscape does not condone the dissemination of the document in question. Although the document was based on substantiated facts, it was intended for internal use only and was not designed or intended for external distribution. We are conducting our own thorough investigation to determine how an internal document ended up in outside hands. "Yesterday, Softscape was successful in having the court narrowly limit the restraining order. (http://www.softscape.com/pdf/doc/TRO_Decision080313.pdf)

"It is common in a highly competitive market for vendors to review each others' presentations, webinars, and demonstrations and have competitive sales tools. The SuccessFactors lawsuit is an act of desperation by a hostile industry predator."

About Softscape (www.softscape.com)

Softscape is the global leader in integrated people management software that enables organizations to more effectively drive their business performance. Recognized by industry analysts as the most comprehensive strategic human capital management solution, Softscape provides complete employee lifecycle management, including a core system of record, in a single, integrated platform for improved business intelligence. The company offers customers of all sizes and in all industries the most flexibility and choice with multiple purchase, configuration, and deployment options. For more than a decade, Softscape has helped millions of workers across 156 countries be more successful at their jobs while contributing to bottom-line results. Softscape's customers represent Fortune 500/Global 500, mid-market, and government organizations, including

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Susan Mohr
+1 508 358-1072 or
smohr@softscape.com

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EXHIBIT 27

SOFTSCAPE PRIVILEGE LOG FOR HARD COPY DOCUMENTS

SuccessFactors v. Softscope

Case No.: CV-08-01376-CW (BZ)

Northern District of California

Version Date: July 17, 2008

Bates #	Document Type	Date	Time	Author	Recipient(s)	Subject	Privilege Asserted
SSHC000002	Phone Record	03/04/08			David Watkins	Personal and private telephone number	Right to Privacy; Confidential Human Resources Information
SSHC000003	Phone Record	03/04/08			David Watkins	Personal and private telephone number	Right to Privacy; Confidential Human Resources Information
SSHC000004	Phone Record	03/04/08			David Watkins	Personal and private telephone number	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information
SSHC000242	Phone Record	03/07/08	09:35	Yes Telecom	Alex Bartfield	Personal and private telephone number	Right to Privacy
SSHC000240	Phone Record	03/05/08	11:56	Yes Telecom	Alex Bartfield	Personal and private telephone number	Right to Privacy
SSHC000240	Phone Record	03/05/08	12:47	Yes Telecom	Alex Bartfield	Personal and private telephone number	Right to Privacy
SSHC000241	Phone Record	03/04/08	7:09P	Verizon Wireless	Matt Park	Personal and private telephone number	Right to Privacy

Bates #	Document Type	Date	Time	Author	Recipient(s)	Subject	Privilege Asserted
SSHC000241	Phone Record	03/05/08	7:47A	Verizon Wireless	Matt Park	Personal and private telephone number	Right to Privacy
SSHC000241	Phone Record	03/05/08	7:49A	Verizon Wireless	Matt Park	Personal and private telephone number	Right to Privacy
SSHC000242	Phone Record	03/04/08	5:32P	Verizon Wireless	Michelle Davis	Confidential and proprietary customer information	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information
SSHC000242	Phone Record	03/04/08	6:37P	Verizon Wireless	Michelle Davis	Personal and private telephone number	Right to Privacy
SSHC000242	Phone Record	03/04/08	6:37P	Verizon Wireless	Michelle Davis	Personal and private telephone number	Right to Privacy
SSHC000242	Phone Record	03/04/08	7:05P	Verizon Wireless	Michelle Davis	Personal and private telephone number	Right to Privacy; Confidential Human Resources Information
SSHC000242	Phone Record	03/04/08	7:09P	Verizon Wireless	Michelle Davis	Personal and private telephone number	Right to Privacy; Confidential Human Resources Information
SSHC000243	Phone Record	03/04/08	5:33P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	5:33P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	5:40P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy

Bates #	Document Type	Date	Time	Author	Recipient(s)	Subject	Privilege Asserted
SSHC000243	Phone Record	03/04/08	5:44P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	6:08P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	6:20P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	6:35P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	6:38P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	6:39P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	7:02P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	7:03P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	7:16P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	7:55P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	9:50P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	9:52P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy

Bates #	Document Type	Date	Time	Author	Recipient(s)	Subject	Privilege Asserted
SSHC000243	Phone Record	03/04/08	9:55P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	9:59P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	10:05P	Verizon Wireless	Sean Tamani	Personal and private telephone number	Right to Privacy
SSHC000243	Phone Record	03/04/08	10:40P	Verizon Wireless	Sean Tamani	Confidential and proprietary customer information	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information
SSHC000244	Phone Record	03/04/08	6:14P	Verizon Wireless	Dennis Martinek	Confidential and proprietary customer information	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information
SSHC000245	Phone Record	03/04/08	8:06P	Verizon Wireless	Rick Watkins	Personal and private telephone number	Right to Privacy
SSHC000246	Phone Record	03/04/08	8:27P	Verizon Wireless	Rick Watkins	Personal and private telephone number	Right to Privacy
SSHC000246	Phone Record	03/04/08	9:43P	Verizon Wireless	Rick Watkins	Personal and private telephone number	Right to Privacy
SSHC000247	Phone Record	03/04/08	5:04P	Verizon Wireless	Susanne McFee	Confidential marketing call	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information

Bates #	Document Type	Date	Time	Author	Recipient(s)	Subject	Privilege Asserted
SSHC000247	Phone Record	03/05/08	7:35A	Verizon Wireless	Linda Gagne	Confidential customer call	Right to Privacy; Trade Secret/ Confidential and Proprietary Business Information

EXHIBIT 28

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12 Attorneys for Plaintiff
13 SUCCESSFACTORS, INC.

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 OAKLAND DIVISION
17

18 SUCCESSFACTORS, INC., a Delaware
corporation,

19 Plaintiff,

20 v.

21 SOFTSCAPE, INC., a Delaware
22 corporation; and DOES 1-10, inclusive,

23 Defendants.
24

Case No. CV 08-1376 CW

MANUAL FILING NOTICE

Date: September 3, 2008
Time: 10:00 a.m.
Courtroom: G, 15th Floor
Judge: Hon. Bernard Zimmerman
Date of Filing: July 30, 2008
Trial Date: May 11, 2009

25 **RE: CONFIDENTIAL EXHIBITS 1, 2, 3, 11, 12, 15, 16, 17, 18, 19, 21, 22, 28, . TO**
26 **THE DECLARATION OF HENRY Z. CARBAJAL IN SUPPORT OF MOTION TO**
27 **COMPEL PRODUCTION OF DOCUMENTS, FURTHER INTERROGATORY**
28 **ANSWERS AND PROPER PRIVILEGE LOGS**

1 This filing is in paper or physical form only, and is being maintained in the case file in the
2 Clerk's office.

3 If you are a participant on this case, this filing will be served in hard-copy shortly.

4 For information on retrieving this filing directly from the court, please see the court's main
5 web site at <http://www.cand.uscourts.gov> under Frequently Asked Questions (FAQ).

6 This filing was not efiled for the following reason(s):

7 _____ Voluminous Document (PDF file size larger than efileing system allowances)

8 _____ Unable to Scan Documents

9 _____ Physical Object (description): _____

10 _____ Non Graphical/Textual Computer File (audio, video, etc.) on CD or other
11 media

12 X Item Under Seal

13 _____ Conformance with the Judicial Conference Privacy Policy (General Order 53).

14 _____ Other (description): _____

15 Dated: July 30, 2008

FENWICK & WEST LLP

17 By: /s/ Patrick Premo
18 Patrick Premo

19 Attorneys for Plaintiff
20 SUCCESSFACTORS, INC.

EXHIBIT 29

MINTZ LEVIN

Jeffrey M. Ratinoﬀ | 650 251 7755 | jratinoﬀ@mintz.com

1400 Page Mill Road
Palo Alto, California 94304-1124
650-251-7700
650-251-7739 fax
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June 20, 2008

VIA HAND DELIVERY

Patrick E. Premo, Esq.
Fenwick & West, LLP
801 California Street
Mountain View, CA 94041

Re: *SuccessFactors, Inc. v. Softscape, Inc.*; Case No.: C08-1376 CW (BZ)

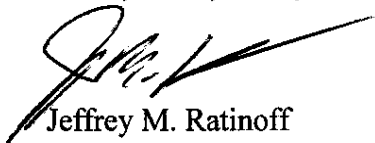
Dear Patrick:

Enclosed please find documents bearing bates numbers SSHC000240 - SSHC000246, which consist of the cellular phone records for Alex Bartfield, Matt Park, Michelle Davis, Sean Tamani, Dennis Martinek, and Rick Watkins for calls made between 5:00 p.m. EST on March 4, 2008 and 8:00 a.m. EST on March 5, 2008. These documents have been designated as "Highly Confidential - Outside Attorney's Eyes Only" and should be treated accordingly.

Please note that we have redacted telephone numbers made during the agreed-upon time period on the grounds that such information is unrelated to the present litigation and protected by the constitutional right of privacy and the trade secret privilege, which is reflected in the enclosed privilege log. We also redacted phone calls outside of the agreed-upon time period, which are not reflected in the privilege log because such information is non-responsive.

Sincerely,

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.



Jeffrey M. Ratinoﬀ

JR/ak

Enclosures

4362800v.1

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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EXHIBIT 30

MINTZ LEVIN

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July 25, 2008

VIA HAND DELIVERY

Henry Carbajal, Esq.
Fenwick & West, LLP
801 California Street
Mountain View, CA 94041

Re: *SuccessFactors, Inc. v. Softscape, Inc.*; Case No.: C08-1376 CW (BZ)

Dear Henry:

Enclosed please find a documents bearing Bates Nos. SSHC000908 - SSHC000916, which consist of Softscape's phone records for Mike Brandt, David Watkins and Lillian Watkins. These documents have been designated as "Highly Confidential - Outside Attorney's Eyes Only" and should be treated accordingly.

Please note that we have redacted telephone numbers made during the agreed-upon time period on the grounds that such information is unrelated to the present litigation and protected by the constitutional right of privacy and the trade secret privilege. We will provide a revised privilege log for all phone records produced next week that will contain annotations for the redacted telephone numbers as previously represented.

Sincerely,

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.



Jeffrey M. Ratinoﬀ

JMR/ak
Enclosures

4389021v.1

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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EXHIBIT 31

FENWICK & WEST LLP

SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041
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June 27, 2008

PATRICK E. PREMO

EMAIL PPREMO@FENWICK.COM
DIRECT DIAL (650) 335-7963

VIA E-MAIL & U.S. MAIL

Bryan J. Sinclair, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
1400 Page Mill Road
Palo Alto, CA 94062

Re: *SuccessFactors, Inc. v. Softscape, Inc.*, Case No. C-08-1376 CW (BZ)

Dear Bryan,

I am writing in connection with Softscape, Inc.'s waiver of the attorney-client privilege as it relates the PowerPoint presentation entitled "The Naked Truth" ("Presentation") and Softscape's related investigation.

As you know, SuccessFactors, Inc. has requested documents from Softscape regarding the Presentation and investigation. Among other things, SuccessFactors has asked for information concerning the:

- creation of and information in the Presentation (Request Nos. 1, 4, 5, 7, 8, 10-12, 14-16, 43, 59, 62);¹
- release, publication, and dissemination of the Presentation (Request Nos. 2, 5, 9-12, 20-54, 58, 63);
- sales, marketing, and other communications Softscape has had with third parties concerning the Presentation (Request Nos. 3, 5, 6, 12-13, 19, 20-54, 58, 59, 63); and
- investigation by Softscape of the above-listed and other related matters (Request Nos. 5, 18, 43, 58; *see also* Request Nos. 1-16, 19-54, 58-59, 62-63).

Softscape has objected in part to virtually all of these requests to the extent they call "for the production of material protected by the attorney-client privilege or the attorney work product doctrine."²

¹ The identified "Request Nos." refer to the document requests contained in Plaintiff's First, Second, Third, and Fourth Sets of Requests for Production of Documents and Things.

² Softscape has lodged a privilege objection to all document requests except for Request Nos. 44-46 and 48 and the requests contained in Plaintiff's Fourth Set of Requests for Production of Documents and Things (Request Nos. 56-66). The fourth set of document requests has a return date of July 17, 2008.

Notwithstanding its privilege objections, Softscape has an obligation to produce any and all documents responsive to the requests described above. On March 12 and 17, 2008, Susan Mohr, Softscape's General Counsel, submitted declarations in support of an opposition to SuccessFactors' application for a temporary restraining order ("Mar. 12, 2008 Decl."), and in support of an opposition to SuccessFactors' motion for expedited discovery ("Mar. 17, 2008 Decl."). In these declarations, Ms. Mohr submitted testimony concerning the:

- creation of and information in the Presentation;³
- release, publication, and dissemination of the Presentation;⁴
- sales, marketing, and other communications Softscape has had with third parties concerning the Presentation;⁵ and
- investigation by Softscape of the above-listed and other related matters.⁶

The two declarations, in other words, contain attorney testimony on the very same matters that are at issue in the litigation and described in SuccessFactors' discovery requests.

Ms. Mohr's testimony as to her knowledge and investigative findings is undoubtedly the result of her communications with Softscape employees regarding the Presentation. The declarations therefore disclose more than mere facts about the Presentation and investigation. Rather, the statements in Ms. Mohr's declarations "represented opinions, based upon confidential communications between attorney and client that go to the heart of the legal claims at issue. By including these communications in the affidavit, counsel . . . effectively waived the attorney-client privilege." *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006) (privilege waived where attorney statements in affidavit "could only have been gleaned . . . through communications from his clients"); *see also Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D. D.C. 1982) ("A party cannot voluntarily disclose facts in his favor before a judicial

³ See, e.g., Mar. 12, 2008 Decl. ¶ 4 ("the Presentation . . . was created in-house by Softscape . . . [and] was intended for internal use only by sales and contained what I believed to be accurate information"); Mar. 17, 2008 Decl., Ex. B ("It is a Softscape confidential document that should be used only for internal use by sales.").

⁴ See, e.g., Mar. 12, 2008 Decl. ¶ 4 ("Softscape did not authorize release or publication of the Presentation, and to the best of my knowledge Softscape did not participate in its alleged circulation Although I am continuing to investigate, Softscape is presently unaware how the disclosure of the Presentation occurred. Further, I am not aware of any information that there was any [other] dissemination"); Mar. 17, 2008 Decl. ¶ 4 ("To my knowledge, there have been no further public distributions"), ¶ 7 ("Softscape does not currently know how or by whom the Presentation was released."), ¶ 9 ("Softscape remains unaware of how the Presentation came to be disseminated, but it continues to investigate the facts and circumstances surrounding its distribution.").

⁵ See, e.g., Mar. 12, 2008 Decl. ¶ 5 ("To the best of my knowledge, Softscape has never and is not now using the Presentation in external sales meetings or marketing efforts, and has no intention to release on the internet, or otherwise publish externally, the Presentation, which it considers to be confidential business information of Softscape."); Mar. 17, 2008 Decl. ¶ 5 ("To the best of my knowledge, Softscape has never used, is not now using, and will not use the Presentation in any external sales meeting or marketing effort.").

⁶ See, e.g., Mar. 12, 2008 Decl. ¶¶ 4-5 (describing general counsel's investigative findings and stating that she is "continuing to investigate"); Mar. 17, 2008 Decl. ¶¶ 4-10 (describing general counsel's investigative findings and stating that Softscape "continues to investigate the facts and circumstances").

tribunal, when they are helpful to his cause, and then invoke the attorney-client privilege as a shield to prevent a searching inquiry so that a court may determine the truthfulness of the facts initially presented.”).

To be clear, by disclosing its attorney’s investigative findings, based on potentially privileged communications with her clients, Softscape has voluntarily and expressly waived any privilege and work-product protection as to information relating to the subject matter of the Presentation and investigation. Softscape further waived the privilege by producing documents in the form of e-mails regarding its investigation. This waiver is not limited to the statements in Ms. Mohr’s declaration. By submitting attorney testimony in opposition to SuccessFactors’ application for a temporary restraining order and motion for expedited discovery and producing documents, Softscape “affirmatively chose” to waive the attorney-client privilege in connection with information “relating to the same subject matter” of the Presentation and investigation. *In re Papst Licensing*, No. CIV A. MDL-1298, 2001 WL 1135265, at *5 (E.D. La. Sept. 24, 2001); *see also Pucket v. Hot Springs School Dist.*, 239 F.R.D. 572, 580 (D. S.D. 2006) (“Voluntary disclosure of the confidential communication to either an opposing or third party expressly waives the privilege The scope of an express waiver is not limited to the communication disclosed but applies to other communications relating to the same subject matter.”) (citations and internal quotation marks omitted).

Please confirm in writing by close of business on June 30, 2008 that Softscape will produce all documents responsive to Softscape’s requests by July 3, including any documents subject to the privilege waiver discussed above. Please also confirm that you will provide a privilege log by July 3 indicating which documents you believe are still protected by the attorney-client privilege or work-product doctrine. Because Softscape’s documents and privilege logs were due long ago,⁷ we will ask the Court for immediate relief in the event you fail to give us such assurances.

Very truly yours,

FENWICK & WEST LLP



Patrick E. Remo

⁷ The return dates on SuccessFactors’ first, second, and third sets of document requests were April 28, May 5, and May 19, 2008, respectively.